

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE
VOLUME 7

IN RE: IN THE MATTER OF :
INTEGRATED RESOURCE :
PLANNING FOR THE PROVISION :
OF STANDARD OFFER SUPPLY : PSC DOCKET NO. 06-241
SERVICE BY DELMARVA POWER :
& LIGHT COMPANY UNDER 26 :
DEL. C. §§ 1007(c) & (d); :
REVIEW AND APPROVAL OF THE :
REQUEST FOR PROPOSALS FOR :
THE CONSTRUCTION OF NEW :
GENERATION RESOURCES UNDER :
26 DEL. C. §§ 1007(d) :
(OPENED JULY 25, 2006) :

Public Service Commission Hearing taken
pursuant to notice before Gloria M. D'Amore, Registered
Professional Reporter, in the offices of the Public
Service Commission, 861 Silver Lake Boulevard, Cannon
Building, Suite 100, Dover, Delaware, on Tuesday,
December 19, 2006 beginning at approximately 2:25 p.m.,
there being present:

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1 APPEARANCES:

2 On behalf of the Public Service Commission:

ARNETTA McRAE, CHAIR

3 J. DALLAS WINSLOW, COMMISSIONER

JAY LESTER, COMMISSIONER

4 JOANN CONAWAY, COMMISSIONER

JEFFREY CLARK, COMMISSIONER

5 On behalf of the Department of Natural

6 Resources & Environmental Control:

PHIL CHERRY

7 On behalf of the Public Service Commission Staff:

8 GARY A. MYERS, ESQUIRE

9 On behalf of the Public Service Commission Staff:

10 JAMES McC. GEDDES, ESQUIRE

11 On behalf of the Public Service Commission Staff:

REGINA A. IORII, ESQUIRE

12 On behalf of the Public Service Commission Staff:

BRUCE H. BURCAT, EXECUTIVE DIRECTOR

13 CONNIE S. McDOWELL, CHIEF OF TECHNICAL SERVICES

KAREN J. NICKERSON, SECRETARY

14 ROBERT HOWATT, PUBLIC UTILITIES ANALYST

15 On behalf of the Office of the Public Advocate:

G. ARTHUR PADMORE

16 JOHN CITROLO

17 On behalf of Delmarva Power & Light Company:

ANTHONY WILSON, ESQUIRE

18 MARK FINFROCK

19 On behalf of Bluewater Wind, LLC and Bluewater
Wind Delaware, LLC:

20 THOMAS P. MCGONIGLE, ESQUIRE

PETER D. MANDELSTAM, PRESIDENT

21 JIM LANARD

22 On behalf of Downes Associates, Inc.:

23 ALEXANDER M. GRIER, P.E.

24

1 APPEARANCES CONTINUED:

2 On behalf of New Energy Opportunities, Inc.:
3 BARRY J. SHEINGOLD

4 On behalf of the University of Delaware:
5 JEREMY FIRESTONE, Ph.D., J.D.
6 WILLETT KEMPTON, Ph.D.

1 CHAIR McRAE: The first matter we are
2 going to take is Bluewater Wind's emergency application.
3 That will be followed by the petition for rehearing. Let
4 me just explain my rationale.

5 Bluewater Wind is looking for
6 clarification of the existing order, and the
7 Firestone/Kempton petition is for rehearing on the order.

8 So, why don't we start with the existing
9 order, then we'll deal with the rehearing, and then we
10 will deal with the proposed order. And then we have, in
11 connection with this docket, a consultant's request for
12 the Commission to consider.

13 MR. FIRESTONE: Madam Chair and
14 Commissioners. Jeremy Firestone.

15 There are some issues that are going to
16 arise in our petition which will have direct bearing on
17 some of the legal arguments put forward by Mr. Geddes in
18 opposition to the petition. And I don't know if that is
19 going to color your view as to whether that's still the
20 most appropriate way to proceed.

21 CHAIR McRAE: Legal arguments that
22 affect Bluewater Wind?

23 MR. FIRESTONE: Yes. It will have
24 direct bearing on some of the legal arguments that

1 Mr. Geddes raised in opposition to Bluewater Wind's
2 emergency petition.

3 COMMISSIONER WINSLOW: I have no
4 problem.

5 CHAIR McRAE: The sequence isn't magic.

6 COMMISSIONER WINSLOW: Madam Chair,
7 assuming that Bluewater is not speaking to oppose what
8 was just stated by Mr. Firestone, then I would
9 respectfully submit that we consider reversing the order
10 that was recommended.

11 CHAIR McRAE: It's not fixed in
12 concrete. That's fine with me.

13 MR. MANDELSTAM: Bluewater concurs.

14 CHAIR McRAE: That's perfectly fine.

15 Did I hear someone else?

16 So, we will now start out with the
17 petition for rehearing.

18 Mr. Firestone, are you going to be
19 speaking on that?

20 MR. FIRESTONE: That's correct.

21 CHAIR McRAE: I have so many papers.
22 Let me catch up with that. Well, you can go ahead and
23 get started. I know it's in this pile.

24 MR. FIRESTONE: Good afternoon, Madam

1 Chairwoman, Members of the Commission.

2 Again, for the record, my name is Jeremy
3 Firestone. And first I want to address a procedural
4 issue that was raised by a memorandum authorized by Bruce
5 Burcat of December 4, 2006. This is one of the issues
6 that has bearing on the legal arguments in the Bluewater
7 Wind matter.

8 In that memorandum Mr. Burcat stated,
9 quote, The Commission, close quote, has not decided
10 whether its own rules apply, in particular Rule 34(b).

11 He goes onto state that the Commission
12 believes that our petition does not stay the RFP process,
13 or suspend the finality of the order. As the Commission
14 rules are trumped by House Bill 6. Essentially, arguing
15 that 34(b) doesn't apply because of the tight time
16 deadlines established in HB 6. I would submit that
17 interpretation is incorrect as a matter of law.

18 First, we look to Commission Rule 1,
19 which provides that quote, These rules govern practice
20 and procedure in all matters before the Commission and
21 shall be liberally construed to secure just fair
22 determination. It says that they apply in all matters.

23 Secondly, it also provides the
24 Commission with a process should other procedures be

1 required. That is in Section Rule 1(b). It says,
2 nothing in these rules shall preclude the Commission in
3 the exercise of its statutory duties and where
4 circumstances reasonably require from prescribing
5 different procedures to apply to specific proceedings.

6 The Commission didn't adopt, though, any
7 special rules regarding rehearing or reconsideration and
8 had the option, clearly, under Rule 1(b). It didn't do
9 it. And so, we suggest that Rule 34(b) applies.

10 The problem with Mr. Burcat's memorandum
11 and view is that if the order is not suspended, it would
12 result in the borrowing of our ability to file a judicial
13 appeal of the Commission order -- at Section 510 provides
14 a 30-day period from the date of service. So, we would,
15 then, be falling back to an earlier date, thus now
16 barring us from judicial review.

17 So, if we assume, even assuming for the
18 sake of argument, that HB 6 can trump the Commission
19 rules, I think we can all agree that the U.S. and
20 Delaware constitutions, which guarantees due process of
21 law would trump any state statute, and thus, HB 6 cannot
22 be interpreted as denying us judicial review.

23 We first would ask the Commission to
24 repudiate the Staff's position, which is represented as

1 being, in Mr. Burcat's memorandum, as being the position
2 of this Commission.

3 I would note that Mr. Geddes, Counsel to
4 the Staff, either is unaware of the Staff's position, or
5 is simply taking inconsistent positions because in the
6 Bluewater petition he claims, I think, mistakenly for a
7 whole host of reasons, that their petition comes too
8 late. And under the Administrative Procedures Act and
9 the Commission's procedural rules, a party has 30 days
10 from an entry of an order to move for reconsideration of
11 that order.

12 Staff and Mr. Geddes can't have it both
13 ways. They can't say, you got to do it within 30 days,
14 Bluewater. But Firestone and Kempton, you can do it
15 within 30 days, but it's of no avail. It doesn't really
16 matter, and you're ultimately barred from judicial
17 review.

18 I would submit, again, either Mr. Geddes
19 is either uninformed of his own client's position, or he
20 is taking diametrically inconsistent positions both of
21 which cannot stand.

22 Second, in response, perhaps, to our
23 petition, there was a letter from the Chamber of
24 Commerce, 11 December, 2006. We would suggest that that

1 be stricken from the record as out of order. It is
2 clearly not responsive to our petition. And in any
3 event, clearly has no place in a proceeding charged with
4 determining lawful and fair terms for a request for
5 proposal.

6 It is beyond me to understand how the
7 Chamber can support one bidder as proposing a project
8 that is most compatible with its objectives without
9 having seen the bids. Who knows which bid will provide
10 the best mix of price stability and reduction of
11 environmental impact at this stage of the process, let
12 alone provide the economic benefits the Chamber professes
13 to desire. I don't presume to know. Apparently, the
14 Chamber does. But given its nonresponsive matter to the
15 petition, we would ask it be stricken.

16 Moving on.

17 CHAIR McRAE: Can I just clarify
18 something?

19 MR. FIRESTONE: Yes.

20 CHAIR McRAE: Several letters were
21 filed. I mean, The League of Women Voters, the Chambers
22 of Commerce, builders, I mean, any number of
23 organizations.

24 MR. FIRESTONE: I believe --

1 CHAIR McRAE: Can you distinguish why
2 you single out the Chamber of Commerce?

3 MR. FIRESTONE: Yes. The League of
4 Women Voters and the Honorable Jack Markell spoke to our
5 petition and talked about the relationship of the issues
6 in our petition dealing with price versus the environment
7 and issues not quantifying the omissions of coal in a
8 monetary way.

9 In contrast, the Chambers of Commerce
10 didn't speak to the petition, but merely said, We think
11 NRG's proposal is going to provide us economic benefits.
12 They're going to provide us tax money. They're a good
13 employer, and we ask that you grant NRG -- give NRG a
14 good shake in this proceeding.

15 The other ones didn't say, We want
16 Bluewater Wind. We want NRG. We want SCS. We want
17 Conectiv. They spoke to the process.

18 CHAIR McRAE: Excuse me for a moment.

19 COMMISSIONER WINSLOW: Madam Chair.

20 Mr. Firestone, I can assure you that we
21 have heard from a lot of people. A lot of things were
22 not necessarily relevant. And we will give, I think,
23 attention to those things that are relevant to the legal
24 issues involved in this case, and we will not give

1 consideration to those things which are purely from a
2 political constituency and are not relevant to the issues
3 in this case.

4 MR. FIRESTONE: Thank you very much,
5 Commissioner Winslow. I think that addresses my concern.

6 CHAIR McRAE: Very good.

7 MR. FIRESTONE: To our petition. The
8 Commission Staff and Mr. Geddes mistates or
9 misunderstands our contentions.

10 In our petition, we are not claiming
11 that we were denied due process due to time constraints;
12 nor are we making, quote, The same substantive arguments
13 rejected by this body.

14 While those arguments touch on areas
15 discussed by the Commission, they are clearly different
16 than those that we made elsewhere. Merely stating that
17 they are doesn't make them so.

18 I will assume for the sake of argument
19 Mr. Geddes' point that the Commission is not required to
20 specifically address each and every comment that we have
21 submitted. That is not our contention.

22 Our contention is that neither the
23 Staff, nor the independent consultant, nor the
24 Commission, nor the Energy Office ever considered, let

1 alone address, our contentions that are embodied in the
2 red lined RFP. And that's because, for whatever reason,
3 those comments were mislaid by Staff, and it was only
4 when we ultimately brought it to this Commission's
5 attention that they were located by Staff, and then they
6 were just posted on the web site. They were never
7 considered, and we would ask that this Commission
8 consider whether to address them or not.

9 CHAIR McRAE: Let me just be clear. The
10 Commissioners, including myself, received, and I'm
11 assuming read, and I can speak only for myself there,
12 your red lined comments. So, I think maybe that's
13 something that can be discussed more. But for you to say
14 that they weren't considered, though, assumes that we
15 never had access to them and read them, which isn't, in
16 fact, the case.

17 MR. FIRESTONE: Well, the other parties
18 didn't necessarily have full access to them, who
19 participated in the proceedings. And so, we don't
20 believe they were aired in the manner in which they
21 should have been. Because they weren't placed on the
22 docket, along with all of the other comments, which were
23 submitted by all of the other parties.

24 Our view is, to the extent that our

1 rehearing petition is not granted to consider the
2 substantive merits of our claim, it is only then that we
3 will have been denied due process. We're not objecting
4 to the timing, that they weren't considered before as a
5 matter of timing. We're objecting to the fact that, in
6 our view, they were not appropriately considered by this
7 Commission.

8 COMMISSIONER CLARK: Madam Chair. Just
9 a question, I mean, to kind of get to the heart of what
10 you're doing.

11 You are petitioning for a rehearing.
12 You didn't appeal within -- I mean, this order was
13 entered at the end of October?

14 MR. FIRESTONE: Correct.

15 COMMISSIONER CLARK: And your reasoning,
16 if you have a disagreement with not appealing it, was
17 that the written transcript wasn't available. I'm trying
18 to understand why if you disagree with something here,
19 you didn't file an appeal and how the petition for
20 rehearing fits into that.

21 MR. FIRESTONE: Why we didn't go to
22 court at that point?

23 COMMISSIONER CLARK: Well --

24 MR. FIRESTONE: I mean, I wanted to give

1 this body an opportunity to correct what we thought was
2 an error before we took that next step.

3 There are other issues, as well, that we
4 had with the order that we wanted to address in a
5 rehearing petition, as well.

6 COMMISSIONER CLARK: I appreciate what
7 you're requesting. We're on a very tight time frame
8 here. The order was entered at the end of October, as we
9 were directed to do. I mean, you got your legal reasons,
10 and nobody is going to take that away from you, or
11 prevent you from doing that.

12 At this stage now, I mean, I can't
13 understand why this is coming out.

14 MR. FIRESTONE: I didn't want to be
15 later faced with an argument that we did not exhaust our
16 administrative remedy. One of our administrative
17 remedies is to seek rehearing and reconsideration. I'm
18 just trying to cover my legal basis, if you will, and do
19 what I thought was the appropriate procedure, given the
20 rules that were set out by the Commission in Rule 34(b).

21 COMMISSIONER CLARK: Thank you.

22 CHAIR McRAE: How does that respond to
23 your question, the 30-day component?

24 COMMISSIONER CLARK: I just wanted to

1 get whatever response he had with regard to his rationale
2 for going the rehearing route after the 30-day appeal
3 deadline. Procedurally, it seems kind of odd to me.

4 MR. FIRESTONE: Well, we filed within
5 the 30 days of the order. So, we did it in clear
6 compliance with 34(b).

7 The Staff position is that, Well, we're
8 not even sure if the Commission's own rules apply, and if
9 they do, they're superceded by HB 6. Well, how was I
10 supposed to know that was even the Staff's position. I
11 mean, no one set that out before. There was no ability
12 to go to reconsideration.

13 So, we just followed what looked like
14 the blueprint that this own Commission has set out, as
15 ways to proceed in an administrative proceeding.

16 CHAIR McRAE: Continue.

17 MR. FIRESTONE: Anyway, substantively,
18 then, we ask that this Commission consider our argument
19 that weighting price more than the environment, as we
20 said, suggest that a one cent per kilowatt reduction in
21 price is more highly valued than a one kilowatt
22 environmental benefit. We submit that there's no
23 rationale benefit for this belief. And certainly, no one
24 has put forth any rationale to support it.

1 On the contrary, as we say, there is
2 reason to believe that the value assigned to
3 environmental benefits is greater than price since only
4 Delmarva ratepayers will benefit from the price, while a
5 much greater number of people will benefit from
6 reductions in environmental impacts. That, we submit,
7 was never considered by this body.

8 Secondly, in our red lined RFP, we
9 provided citations to studies on the expected cost of
10 carbon emission and concluded that these costs should not
11 be borne by the ratepayers, unless the cost were first
12 internalized in a transparent bid that is ultimately
13 approved with the risk borne by the bidder, which can be
14 ensured against.

15 We provided citations to a number of
16 studies, which quantified these costs, and we believe
17 that they should be quantified.

18 And I would note that, in general, our
19 views seem to have drawn support, either in past or in
20 present from the State Treasurer, the League of Women
21 Voters and the Public Advocate. We're not just off on
22 the fringe by ourselves.

23 The next thing I would like to address
24 is our contention that the order amounts to a posthoc

1 rationalization for decisions that this Commission
2 already made.

3 What I'm referring to is that decisions
4 were made at the hearing on October 17th. And that the
5 rationalizations were, essentially, just Staff's attempt
6 to buttress the decisions that had already been made by
7 this Commission.

8 Mr. Geddes cites a number of cases that
9 that this Commission only acts by written order. But
10 these citations are unpersuasive.

11 First, the two cases he cites, neither
12 is from a Delaware court; nor do they interpret Delaware
13 law. And even if this were a federal proceeding, they
14 would not be binding as the decisions are from the D.C.
15 Circuit, which doesn't have jurisdiction over decisions
16 by the Federal District Courts in Delaware.

17 Moreover, one of the two cases doesn't
18 even stand for the proposition stated. Rather, it
19 addresses a situation where two out of five commissions
20 on a federal body flirted with a basis for a decision,
21 which if the decision had been made on that ground, would
22 have been unlawful. There was never a contention in that
23 case that the decision was ever, in fact, made on that
24 ground.

1 More importantly, Mr. Geddes, like
2 ignoring the Commission's rules, ignores this
3 Commission's own orders. And we would submit that while
4 the Commission is not bound by these rulings in the D.C.
5 Circuit, the Commission is bound by its own orders.

6 Order No. 7003, which set up this
7 proceeding explicitly provides, and I quote, If the
8 Commission will hear oral argument and take final action
9 on the request for proposal submitted by Delmarva Power
10 and Light on October 17, 2006, at its regularly scheduled
11 meeting. By this Commission's own order, 7003, it took
12 final action.

13 We're not objecting to you putting that
14 into a written form. But the written form then has to
15 correspond to the final actions that were taken by this
16 Commission's own words on October 17th.

17 I would also point the Commission to
18 Title 26, Section 501(c), which provides that, not only
19 order, but, quote, determinations of this Commission are
20 final when approved and confirmed by at least a quorum of
21 the Commission. There clearly was a quorum of the
22 Commission at that hearing, even if it wasn't, quote, an
23 order in the minds of the Commissioners. It clearly was
24 a determination, and by that statute it is final, as

1 well.

2 COMMISSIONER WINSLOW: Mr. Firestone,
3 may I ask you a question please, sir.

4 Often times we sit here and we make
5 decisions based upon the information that we've heard,
6 and the testimony we've heard, the documents that were
7 given as evidence, and then when we make a decision, we
8 don't reiterate all of the supporting information we
9 heard to make our decision. We make a decision based
10 upon on what we heard, and then, later the Staff
11 documents on the record that which we heard that is
12 supportive of our decision.

13 Now, I'm not sure if I articulated that
14 correctly, but I think I did. And your argument seems to
15 suggest that we have to -- in our decision making process
16 -- articulate for the record exactly, I guess, the
17 rationale for our decision, as well as our decision, or
18 the Staff, I guess, there's some standard the Staff has
19 got to come up with respect to how it represents our
20 decision or the rationale for our decision.

21 I'm not sure I understand completely
22 where you're coming from.

23 MR. FIRESTONE: I'm not just saying that
24 is the process that you need to follow in all instances.

1 But by this Commission's own order, you said you were
2 going to take final action. And, to me, final action
3 means final action. At that point, all that then can
4 occur is that if you're going to put it in written form,
5 then the order has to embody the final action that was
6 taken.

7 So, all we wanted was that the order,
8 instead of putting in a bunch of reasons that the Staff
9 jimmied up and decided that that's what the Commission
10 relied on, to say for the reasons discussed on the record
11 at the hearing on October 17th, the Commission voted "X."
12 We have a transcript. We know the basis for these
13 decisions. We know all of the discussion that took
14 place. And that, to me, is the rationale.

15 This hidden rationale that the Staff is
16 trying to put in, to me, they are trying to pad the
17 record after the fact to the benefit of their position,
18 which may or may not have prevailed at the time that the
19 Commission took final action.

20 COMMISSIONER WINSLOW: Thank you.

21 MR. FIRESTONE: Mr. Geddes appears to
22 contend that in any event, the rationalizations are not
23 posthoc because the Commission Energy Office first voted
24 to adopt the independent consultant's report, and then

1 separately address various individual issues at the
2 request of the parties.

3 Essentially, he seems to be claiming
4 that, Well, you adopted the report at this hearing, and
5 so, given that you adopted the report, then anything in
6 the report is fair game in the written order.

7 But the problem is, first, Mr. Geddes is
8 wrong as a matter of timing. The individual votes and
9 the votes that we're concerned about on allocation and
10 carbon took place before that more general vote related
11 to the independent consultant's report.

12 More importantly, Mr. Geddes is
13 substantively wrong. Indeed, at the end of a very long
14 day, Mr. Geddes stated, and I'm quoting from the
15 transcript, Madam Chair, before everyone gets in a rush
16 to leave, I believe the Commission earlier said that they
17 were inclined to have a final clean-up motion, to the
18 extent specific issues were not discussed that the
19 Staff's report would be the basis on which the order
20 would be written.

21 Commission Clark then moved, quote, The
22 independent consultant's report be adopted on any issues
23 not covered, other than the two that will be addressed at
24 the October 31st meeting.

1 The allocation of points and the
2 discussions, the things that we are concerned about in
3 the order, as far as these posthoc rationalizations and
4 the allocation of points, was specifically discussed and
5 voted on. And thus, the clean-up motion is of no avail.

6 The clean-up motion that Mr. Geddes put
7 before this Commission and that this Commission voted on
8 adopting the IC's report only applied to matters not
9 specifically addressed.

10 In the end, it's not clear what
11 Mr. Geddes and the Staff fear from our request. That the
12 Commission simply strike the posthoc rationalizations and
13 state that it adopts the votes took to the reasons
14 expressed in the October 17th hearing.

15 The Commission and DNREC were all
16 present at that hearing, as were the Commission Staff and
17 the independent consultant. And Mr. Geddes was there, as
18 well, to advise the Commission and DNREC on each every
19 deliberation and vote.

20 Why did he and the Staff feel they need
21 to add to the record now.

22 Finally, Mr. Geddes does admits that the
23 order, quote, misstates the facts. That they did object
24 to the weight assigned to this criterion.

1 So, Mr. Geddes admits that the order is
2 mistaken in expressing how, or what our position was
3 related to the site development criterion. But even
4 here, Mr. Geddes suggest that the order need not be
5 corrected to reflect the true facts.

6 Thus, we ask this Honorable Commission
7 to stand by your own rules and the U.S. Delaware
8 Constitutions, rather than Mr. Burcat's memorandum and
9 rule this is a proper petition under Rule 34. And we
10 would ask that this Commission grant our petition and
11 rehear and reconsider this matter.

12 Thank you.

13 COMMISSIONER WINSLOW: When you say
14 "this matter," will you, please, be specific about what
15 you mean by "this matter?"

16 MR. FIRESTONE: The two issues that I
17 referred to in our petition from the red lined RFP
18 comments and that I quoted here, as well.

19 CHAIR McRAE: I captured a list of
20 issues.

21 Mr. Geddes, I'm assuming you are going
22 to respond, since much of it was directed to you.

23 MR. GEDDES: When the Commission is
24 ready, I'm prepared to respond the best I can.

1 CHAIR McRAE: Well, of course, I'm
2 concerned. I'm ready. I don't know about the other
3 Commissioners.

4 MR. GEDDES: Well, I wasn't sure whether
5 anybody else was going to weigh in on this petition.

6 Well, I would ask for Mr. Myers to
7 comment on the December 4th memo that was cited first by
8 Professor Firestone and his comments.

9 CHAIR McRAE: I, actually, was looking
10 for the December 4th memo.

11 COMMISSIONER CLARK: I haven't seen it.

12 MR. MYERS: It wasn't distributed. It
13 was a memo circulated to the parties after the filing, a
14 procedural memo. Mr. Burcat is being dragged through the
15 mud here when I wrote the memo. That's why maybe he
16 asked me to step up.

17 CHAIR McRAE: I'm somewhat handicapped
18 in not having seen the memo. I'm sure you'll summarize
19 it for us.

20 MR. MYERS: I'm not sure that Professor
21 Firestone misstated what was in the memo. Let me tell
22 you why I wrote it and what its intended purpose was.

23 Professor Firestone, I think, captured
24 the problem that's faced with rehearing considerations,

1 and there's a particular sentence in 34(b), and what it
2 means, but, I think, that's not the purpose of what the
3 memo was trying to reflect.

4 The difficulty that always arises from
5 rehearing requests is exactly what Professor Firestone
6 identifies.

7 If there is a set time for appeal, does
8 that clock start running immediately, and if it does, is
9 it then tolled if you follow rehearing request.

10 And that has always raised a question
11 with the courts, particularly, about whether a rehearing
12 -- a timely filed motion for rehearing or a motion to
13 alter, or amend in the federal practice tolls the time
14 for appeal.

15 The sentence in Rule 34(b) was added to
16 address that. And it does, in effect, for purposes of
17 appeal, and I underline that, it was added to, in effect,
18 toll the finality of the judgment for purposes of appeal.

19 But the sentence was put in the memo was
20 to reflect that while it may toll the finality of the
21 judgment for purposes of appeal, it doesn't stay the
22 effectiveness of the order. That's the position the
23 courts have generally taken when faced with the same
24 problem.

1 So, what that means is, in effect, the
2 order goes forward, unless there is a stay application
3 filed. But the time for appeal is toll until a timely
4 filed rehearing request was made.

5 So, that was the purpose of the motion
6 to indicate, particularly in light of statutory
7 deadlines, that the petition for rehearing did not, in
8 effect, stay the effectiveness of the order and the RFP
9 issued under it. But it would, if, in effect, Rule 34,
10 the general rules were applicable, stay the finality of
11 the judgement for any purposes of any judicial review
12 that may be available. That's what it was written for.

13 I'm not sure we're far apart on that
14 issue, unless Professor Firestone wants to argue about
15 that it stayed the effectiveness of the order. And I can
16 show him the cases, including Delaware ones, at least in
17 the court system, that make that division between tolling
18 the time for a period for the appeal period to run, but
19 not staying the effectiveness of the order.

20 MR. FIRESTONE: I would just state that
21 I contacted Mr. Myers and Mr. Burcat and suggested that
22 we enter into some sort of stipulation to address my
23 concerns, and no one ever got back to me when I first
24 broached this subject.

1 So, we may be close. But I got to
2 protect my legal rights, particularly given that offer
3 was not substantively addressed.

4 MR. GEDDES: Well, I think it's time for
5 me to jump in.

6 COMMISSIONER CLARK: Can I ask a
7 question real quick?

8 Since I'm the newest person on the
9 Commission, and to kind of delineate what the lens is we
10 should be looking at this through, I mean, is there a
11 standard for granting a rehearing? Now we've pretty much
12 established a timely application has been filed for a
13 rehearing. What's the standard? Is it simply when
14 justice required standard? What are we looking at? I'm
15 interested in hearing that.

16 MR. GEDDES: I want to make sure
17 Mr. Myers has said everything before I jumped in.

18 MR. MYERS: I'll defer to Mr. Geddes.
19 He's an institution at this Commission. He can tell you
20 more about what is sort of common law on rehearing before
21 the Commission.

22 MR. GEDDES: Madam Chair, Members of the
23 Commission.

24 Professor Firestone has raised some

1 interesting issues. But I don't think they are really
2 relevant to what we're about. I don't think anyone is
3 saying that this petition for rehearing was improperly
4 filed or not timely.

5 The question as to whether he has
6 appellate rights will not be decided by this group. It
7 will be decided by a court and what those rights are and
8 when he should have filed them. And I don't think you
9 need to be bothered by that at all.

10 The only issue, really, for you to
11 consider this afternoon is whether the issues that he has
12 raised that deals with your order, whether you have
13 concern about that.

14 And, generally, I think, Mr. Firestone
15 needs to understand, this agency is controlled by the
16 State ABA, which generally requires a written order. I
17 mean, his rights do not start until there's a written
18 decision, a final decision. And a final decision is not
19 deliberations. A final decision is a written order from
20 this body. And you did write a written order. A written
21 order was written, if that's English, at the end of
22 October. And that's your decision in the case. The
23 transcript, the deliberations are not. And the reason
24 that is true is because the order was circulated to you,

1 as it was circulated to others.

2 And I was here, and Professor Firestone,
3 perhaps, can correct me, but I don't believe that there
4 were comments then raised about the inappropriateness of
5 the order in terms of what it said and what it didn't
6 say. But at the end of the day, it's your order. If you
7 thought it was appropriate to enter, which, I believe,
8 you did, then that's the decision. And the only
9 question, really, for you today is whether you, based on
10 the arguments that you heard, and the observations,
11 whether you still think this properly reflects what you
12 want your decision to be in this case.

13 We tried to, from a procedural point of
14 view, it's clear that the only thing that is really at
15 issue is what's in that order, and that's your decision.
16 And the one point that we noted, that he noted, where we
17 had made a mistake, and we didn't conclude something,
18 include something, we thought had no merit in a sense
19 because you considered that in other context. And it had
20 been part of the report.

21 This whole thing about the RFP and the
22 red lined, I mean, this is a little bit of a tempest in a
23 teapot. And, I guess, it goes to show that no good
24 action goes unpunished.

1 The procedure did not provide for a red
2 lined. We did that out of an excess of caution, out of
3 an opportunity to try to make sure the people understood
4 where the changes were. We could have just put up a new
5 copy on the web page because that's what the order said,
6 but we tried to go the extra step. And now we're being
7 beaten around the ears because we did not include some of
8 his comments with regard to the red lined.

9 Well, I believe that his comments, as we
10 show in our response, were, we thought, considered by the
11 Commission, and certainly considered by Mr. Sheingold and
12 his group, IC. And so, I think that, again, is an
13 argument and it's an interesting observation. But the
14 question is whether you think it has any validity or
15 substance as it relates to your order.

16 So, I don't really see where all of this
17 is going, other than the fact that Mr. Firestone has some
18 legitimate concerns. And if he feels that this order is
19 somehow not properly entered, he has rights in other
20 forums to pursue that position.

21 Thank you.

22 CHAIR McRAE: Commissioners, do you have
23 any comments that you want to make on this matter? Let
24 me be very clear. It's not just the Commissioners

1 because the order also reflects the participation of the
2 Department of Natural Resources and Environmental
3 Control, as represented by Mr. Cherry.

4 So, when I ask about comments, I'm
5 including Mr. Cherry, as well.

6 If you can't hear me in the back, if my
7 voice doesn't carry, just raise your hand and catch my
8 attention, as has been done just now.

9 While the other parties are giving some
10 thought as to whether they want to speak, I will say
11 this.

12 As Mr. Geddes has stated, the orders
13 that are ultimately signed by the Commission are reviewed
14 by the Commission and determinations that are reflected
15 in that order are embraced by the Commission. There are
16 various documents that are incorporated in our review.

17 And, for example, as has been expressed,
18 the adoption of the report captures some of the thinking
19 that the Commission embraced. It's expressed in a
20 prepared document, but the Commission has in the past and
21 has every right to make adjustments to the documents and
22 on occasion has done so. So, I do think that should be
23 clarified.

24 Some of the other parts that I'm still

1 not clear on, some of the issues that I see, and I saw a
2 list of things that you were talking about in your
3 rehearing, and it's that you're asking us to strike
4 various things and review some things that we made
5 decisions on.

6 And absent some decision by this
7 Commission that we need to rethink decisions we have
8 made, I, frankly, don't see where the petition for
9 rehearing is headed. I mean, from a substantive side, I
10 think some of your issues have to do with more your
11 understanding and expectation about of how this
12 Commission should operate versus how it may typically
13 operate. So, I'm not sure how we could address that,
14 frankly.

15 And unless I'm missing something here, I
16 actually don't see anything for the Commission to truly
17 act on, short of redeciding everything, which I
18 personally am not inclined to do, but I'm one
19 Commissioner.

20 COMMISSIONER CLARK: Madam Chair, I'm
21 satisfied that Order 7066 is reflective of our thought
22 process. I mean, we received the comments that Professor
23 Firestone submitted. We reviewed the evidence. I am
24 satisfied that Order 7066 is reflective of our thought

1 process in the case. We spent an entire day going
2 through many difficult issues, doing the best that we
3 could, considering all of the evidence that we heard, and
4 considering all of the comments that we heard and trying
5 to come out with the best product consistent with House
6 Bill 6 that we could.

7 I know there was a comment made about
8 the motion that I made at the end of that with regard to
9 adopting the IC report regarding all matters that
10 weren't, I believe, specifically addressed. And the
11 intent of that, and I believe the intent of the
12 Commission was to encompass everything that wasn't voted
13 upon, not commented upon.

14 So, I think in going back through and
15 reviewing Order 7066, I believe it is reflective of our
16 thought process. And I, for one, am not in favor of
17 granting a rehearing in this case.

18 CHAIR McRAE: Do you want to put that in
19 the form of a motion?

20 COMMISSIONER CLARK: So moved.

21 COMMISSIONER WINSLOW: Second.

22 CHAIR McRAE: If there are no further
23 questions or comments.

24 MR. CHERRY: Just one for the record.

1 We all sat in Legislative Hall on the
2 17th, and again here in this room on the 31st. I have to
3 say, I'm somewhat of a newcomer to the Public Service
4 Commission procedure and the rules of the Commission.
5 And I was a little concerned there you might be asking
6 for a ruling of all of us on the procedural matters of
7 whether or not it was a legitimate motion that you filed
8 or not. I would induct that one in the heartbeat because
9 it's just not my forte here in the world of utilities.

10 But I can tell you that I have been very
11 impressed with the openness of the Commission, with the
12 way the hearing was run on the 17th and again on the
13 31st. Soliciting views from the public when somebody
14 wanted an issue voted on. They were given the floor.
15 They were allowed to say what they wanted to vote on.
16 The Commission and Energy Office responded to that. And
17 I can speak for myself. I read every document that was
18 provided to us prior to those meetings and any others
19 that I have been a party to and read every word of them
20 and studied them in great detail.

21 So, to think there might be a view that
22 your arguments were not heard or weren't considered, I
23 think, is false. They were heard. They were considered.
24 They weren't voted, perhaps, the way you would have

1 liked, but they were most definitely heard in a very
2 open, fair and responsive manner.

3 So, I would be inclined to not vote for
4 your petition either. Thank you.

5 CHAIR McRAE: Well, if there are no
6 further comments, I will call for the vote.

7 All in favor of the rejection of the
8 petition for rehearing all said yea.

9 Yea.

10 COMMISSIONER LESTER: Yea.

11 COMMISSIONER WINSLOW: Yea.

12 COMMISSIONER CONAWAY: Yea.

13 COMMISSIONER CLARK: Yea.

14 MR. CHERRY: Yea.

15 CHAIR McRAE: Opposed?

16 Thank you.

17 COMMISSIONER CLARK: Madam Chair, just
18 as a point of clarification. There is proposed Order
19 7106 that was prepared. I mean, it was my intent to --

20 MR. GEDDES: That order doesn't have any
21 of the reasons. It's just an order for the finality. It
22 said denied and reasons to follow. So, I thought as I
23 placeholder we should probably have something that this
24 Commission could enter, and then an order could be

1 circulated and the Commission could consider whether the
2 reasons that it set forth were appropriate based on the
3 discussion today.

4 CHAIR McRAE: So, 7106 is not what we
5 are signing?

6 MR. GEDDES: It is. It only says
7 denied. It only has the background of the case. It has
8 no analysis. It just says petition denied, which I think
9 your vote did. And when you sign that order, that will
10 actually be something that somebody can take somewhere,
11 if they choose to do so.

12 COMMISSIONER WINSLOW: That's a final
13 order, then.

14 MR. GEDDES: Final order to be
15 supplemented by reason, opinion. But that would nunc pro
16 tunc go back to, I believe, the date of the issuance of
17 that, if you sign it. You don't have to. There's no
18 reason you have to sign it, unless -- well, Mr. Burcat is
19 giving me -- I think he would prefer if you sign an order
20 that memorializes the vote that you just took.

21 CHAIR McRAE: Well, if we do sign this
22 order, maybe I missed this, but where does it -- Oh, the
23 Commission office, the office being DNREC.

24 MR. GEDDES: Correct. Hopefully,

1 there's a signature block for DNREC.

2 CHAIR McRAE: There is a signature
3 block.

4 MR. CHERRY: Has DNREC seen that?

5 CHAIR McRAE: We're not signing anything
6 that DNREC hasn't seen. We can settle with the vote and
7 do the order in the future.

8 MR. GEDDES: I was trying to tell you
9 what you the order was attempting to accomplish.

10 COMMISSIONER WINSLOW: Madam Chair, I
11 prefer that we sign the order. I don't want to slow up
12 anyone's departure to whatever forum they want to depart
13 to.

14 CHAIR McRAE: Let me just say, in
15 fairness, let me be clear as whether this is the familiar
16 to Mr. Cherry.

17 MR. CHERRY: It will be in a moment,
18 Madam Chair.

19 CHAIR McRAE: Okay. The denial is
20 reflected in 7106. So, we have a motion, do you want to
21 tie it to Order 7106.

22 COMMISSIONER CLARK: So moved.

23 COMMISSIONER WINSLOW: Second.

24 CHAIR McRAE: All in favor.

1 Yea.

2 COMMISSIONER LESTER: Yea.

3 COMMISSIONER WINSLOW: Yea.

4 COMMISSIONER CONAWAY: Yea.

5 COMMISSIONER CLARK: Yea.

6 MR. CHERRY: Yea.

7 CHAIR McRAE: Opposed? Very fine.

8 Next is Bluewater Wind. And, I think,
9 they are seeking clarification on some matters.

10 MR. GEDDES: Madam Chair, just for the
11 people who are here for this particular discussion, Staff
12 did file a response to the motion.

13 We received Bluewater's motion at five
14 o'clock yesterday afternoon. We endeavored to articulate
15 a response, which was circulated by E-mail at twelve
16 o'clock today.

17 If anyone has not seen a copy of this,
18 or would like a copy of this, I have copies. I apologize
19 for the lateness of getting you this, but I didn't get it
20 in time to deal with it.

21 I believe the Commission has copies of
22 it. It's not bound. With anything that's prepared
23 quickly, it has a couple of typographical errors that I
24 may have to mention on the record.

1 CHAIR McRAE: I wasn't going to say that
2 I noticed.

3 MR. GEDDES: Unfortunately, I did.

4 CHAIR McRAE: Well, we have several
5 parties at the desk. So, I'm not sure who is
6 representing Bluewater Wind.

7 MR. MCGONIGLE: Madam Chair. This is
8 Tom McGonigle from Wolf Block representing Bluewater. I
9 also have with me the President of Bluewater, Peter
10 Mandelstam. I also have Lex Grier, who is with Downes
11 Associates, Vice-president of Downes Associates. And Jim
12 Lanard from Bluewater, as well.

13 Madam Chair, Members of the Commission,
14 Staff. Let me first start out by thanking you for
15 considering this motion this afternoon on such short
16 notice. We believe it's a critical issue, but we
17 understand, also, that you have a very busy agenda today,
18 so we thank you.

19 What I would like to do is just provide
20 some brief introductory remarks regarding what I see is
21 the legal, or interpretation issue that's before you
22 today. I say brief because we filed a motion yesterday
23 afternoon, and it had some of those arguments put forth.

24 After that, I wanted to, if it's okay

1 with the Chair, turn it over to the President, Peter
2 Mandelstam, to talk a little bit about why this issue is
3 so critical from an operational prospective.

4 What I would like to do is start out
5 with what I call the big picture issue here. And as I've
6 observed these proceedings and I reviewed the orders and
7 the consultant's report and the various documents, it
8 seems to me that the PSC and Delmarva have been wrestling
9 with the overall structure of this RFP now for some time.

10 Delmarva, I think, took the approach
11 initially that they wanted a more restrictive approach
12 and restrictions in terms of who would be able to bid.

13 The PSC, I think, after careful
14 consideration, went in the opposite direction.

15 The Staff called this the big funnel
16 approach. And I think that is captured in the PSC's
17 order in a few places, and if I could, I just wanted to
18 quote from a couple of those statements.

19 Quoting from Page 15 of the PSC's order,
20 Paragraph 32, The Commission and the Energy Office are
21 persuaded that, at this very young stage of the
22 proceedings, we should approve RFP provisions that result
23 in a greater number of bidders being permitted to bid,
24 rather than approving provisions that limit the number of

1 bidders. Staff described such an approach during oral
2 argument as a "big funnel," and we find that description
3 particularly apt; a "big funnel" approach, which will
4 allow a broader pool of potential bidders to submit bids,
5 is preferable to an approach that precludes potential
6 bidders from even bidding. We believe that the problems,
7 or lack thereof with particular bids or bidders can be
8 and are better assessed at the evaluation stage, when
9 DP&L and the Commission and the Energy Office are
10 reviewing and evaluating the bids received. Bids that
11 are deemed too risky or too polluting or too large during
12 an evaluation process will be weeded out at that point.

13 Going down it goes onto say, Thus,
14 inclusiveness is the factor that drives us as we review
15 the proposed RFP provisions and the Final Report and
16 assess those provisions against statutory requirements.

17 Now, I think that big picture issue is
18 critically important as we look at the issue in front of
19 the Commission today.

20 Under what we understand as Delmarva's
21 current interpretation of this issue of the 45, or the
22 400 megawatt issue as put forth in their December 15th
23 letter, and follow-up conference calls that were had, we
24 believe that that interpretation results in, essentially,

1 choking off that funnel at the top, at least as it
2 relates to Bluewater Wind.

3 And so, what I would like to do is talk
4 a little bit about the specifics of this legal issue, and
5 then, again, turn it over to Peter for some detail about
6 how it affects the project.

7 Now, I should say that the legal issue,
8 I think, has shifted a little bit in the sense that we
9 received Staff's filing this afternoon, and it's a
10 different take than what we understood where Delmarva
11 was, so it's a little bit of an evolution here as we are
12 kind of filing papers back and forth, so bear with me.

13 Bluewater understood this issue to be
14 one of project size versus contract size. In other
15 words, this 400 megawatt restriction, was it a
16 restriction against the project size or the contract
17 size. We understood it to be the contract size. And we
18 believe that Delmarva was interpreting it to be a
19 restriction on the project.

20 And if you go through the order the PSC
21 issued, as well as the consultant's report, and the RFP
22 itself, you will find numerous references that I think
23 make it clear that the restriction is to apply as a
24 contract size restriction, not a project size

1 restriction.

2 For example, if you look at Section D,
3 Page 20 in the Commission's order, the heading is
4 Contract Size.

5 Same for Paragraph 44. If you look on
6 Paragraph 47, Page 22 it starts out, The independent
7 consultant proposed a 400 megawatt contract size
8 limitation.

9 If you go onto Paragraph 53, Page 24,
10 the Commission states, We agree with the independent
11 consultant. In keeping with our, quote, "big funnel,"
12 end quote, approach, we do not believe it is appropriate
13 to limit the size of a contract to 200 megawatts.

14 Now, I think, perhaps, with the latest
15 filing from Staff, the issue, or the argument may have
16 changed somewhat.

17 As I understand it, the issue now, I
18 guess, and I say now because we just received it, the
19 Staff's report, not that they're changing their position,
20 that it's a 400 megawatt of installed nameplate capacity.

21 Well, I guess, the concern we have
22 there, and it's a little bit different than project
23 versus contract size, the concern we have there is,
24 that's not what this order says. This order does not use

1 those words. There's a reference to consultant's report,
2 which I know is attached to the order. And the
3 consultant's report uses those words in one place.

4 But if you go to the RFP itself, Page 2,
5 Paragraph 2 it says, Under a PPA Delmarva shall purchase
6 up to 400 megawatts of capacity.

7 Later on it talks about, Proposals for
8 New Generation capable of delivering capacity and energy
9 in excess of that Capacity sold under the PPA are
10 acceptable where the bidder recognizes that less than 100
11 percent of the capacity and associated energy from the
12 New Generation would be purchased by Delmarva.

13 Again, that does not refer to a project
14 limitation. And I don't believe there's any reference to
15 this language that's found in the Staff's report,
16 installed nameplate capacity.

17 So, I guess, where that leaves us is,
18 we're seeking clarification on this issue. We're hopeful
19 that the Commission will continue with it's large funnel
20 approach and not make this a threshold issue. I don't
21 think it is a threshold issue for us.

22 But one of the things that I would like
23 to do, perhaps, before I turn it over to Peter, if I
24 could, with the Chair's indulgence, as I read the Staff's

1 submission, there's a section in Paragraph 6, that,
2 frankly, with some clarification may make this issue go
3 away. And I was wondering, perhaps, if I could seek that
4 clarification to, perhaps, maybe cut this short, if we
5 get the answer that we're hopeful on.

6 CHAIR McRAE: I would love to hear what
7 this one issue is that will get us out of here.

8 MR. McGONIGLE: Paragraph 6, the full
9 bullet says that Bluewater can do any of the following.

10 The first bullet says, Build a 600
11 megawatt project and sell two-thirds of the energy and
12 UCAP therefrom to Delmarva.

13 I guess the question for clarification
14 purposes that we have is, If Bluewater's facility is
15 generating 350 megawatts on a given hour, how much could
16 Bluewater sell to Delmarva?

17 MR. GEDDES: Would you like an answer to
18 that question?

19 CHAIR McRAE: Yes. Doesn't that tie
20 back to the UCAP versus -- you know -- that's the very
21 part of this discussion.

22 MR. SHEINGOLD: From 600 megawatts, it
23 could sell two-thirds of that to Delmarva.

24 MR. MANDELSTAM: Can you repeat the

1 question?

2 MR. MCGONIGLE: The question is, If
3 Bluewater's facility is generating 350 megawatts on a
4 given hour, how much could Bluewater sell to Delmarva?

5 MR. SHEINGOLD: The 350 megawatt hours,
6 if it chose the first bullet, which is to sell two-thirds
7 of the energy in UCAP from the project up to a maximum
8 amount of 400 megawatt hours per hour, it could do that
9 under the first bullet.

10 Now, the other option that it would have
11 if it decided to -- it has 133 wind turbines -- which is
12 about 400 megawatts, and said, I'm going to sell the
13 energy in UCAP, specifically from these wind turbines
14 that are less than 400 megawatts of installed capacity,
15 it could also do that, as well.

16 MR. MCGONIGLE: So, can we sell at 350?

17 MR. SHEINGOLD: Not unless it's coming
18 from 400 megawatts of wind turbines.

19 MR. MANDELSTAM: This is Peter
20 Mandelstam, head of Bluewater Wind.

21 This is really the central issue, Madam
22 Chair, if I may.

23 Regardless of what's in the water,
24 regardless of the efficiencies of any losses, if, at the

1 delivery point, 350 megawatt hours are being delivered in
2 that hour, Bluewater, it seems according to all of the
3 documents, should be able to sell 350 megawatt hours in
4 that given hour.

5 Explain to me why it is that we have to
6 sell less than that?

7 MR. SHEINGOLD: Again, in our
8 consultant's report, when we did our RFP mark up, you
9 specifically amended the 400 megawatt limit and said, We
10 want to sell from 600 megawatts of installed capacity.

11 I think in the paragraph there that's
12 quoted in the Staff's document, we very specifically said
13 that the limit is 400 megawatts of installed capacity.
14 And that you can sell all of the energy and UCAP from 400
15 megawatts of installed capacity. Now, that can be done
16 in several different ways, as we try to layout here.

17 MR. MANDELSTAM: If I may.

18 MR. GEDDES: Go ahead. Sorry.

19 MR. MANDELSTAM: What's interesting is
20 that sentence, which we read a lot, that says, We believe
21 it is prudent or appropriate to do that.

22 But I note for the record that the RFP
23 and the PPA and the nonnegotiable term sheet never
24 mentioned the term installed capacity.

1 MR. SHEINGOLD: The --

2 MR. MANDELSTAM: Is that correct?

3 MR. SHEINGOLD: The term sheet -- those
4 specifically define the maximum amount as 400 megawatts
5 of contract capacity.

6 MR. MANDELSTAM: That's correct.

7 MR. SHEINGOLD: Defined as net
8 capability, which is the same as installed capacity.

9 With regard to wind projects, it's
10 defined as the nameplate generator rating minus station
11 load at which there, basically, is none.

12 MR. MANDELSTAM: I would point out for
13 the record that the word nameplate never appears in the
14 PPA or the nonnegotiable terms.

15 MR. SHEINGOLD: Net capability.

16 COMMISSIONER CLARK: Madam Chair. I
17 mean, the contract versus project size I understood when
18 I got your submission initially. And I see after getting
19 the Staff's response that there's another layer of
20 complexity here that I got to grasp before I can decide
21 anything.

22 The 400 megawatt nameplate capacity
23 limit with respect to UCAP, can you --

24 MR. GEDDES: Page 4. Point of

1 clarification, Madam Chair, to try to answer the
2 Commissioner's question. And maybe this will put it into
3 context because I have been trying to get my arms around
4 this all morning, and I think they're halfway around.
5 I'm not sure they met on the other side.

6 If you look at Page 4, what Staff
7 submitted, which, I believe, everybody has a copy of,
8 this is out of the IC report, which is attached to your
9 order which formed a part of the order. And this is an
10 explanation as to the issue that is being discussed
11 between Mr. Sheingold and the principal of Bluewater.

12 If you look at the second paragraph, and
13 you'll see that Professor Firestone and Professor Kempton
14 are also mentioned, and start with the sentence While,
15 this is the explanation of why this makes a difference.

16 While the energy from a 600 megawatt
17 wind project might be less than that from a 400 megawatt
18 base load unit on an annual basis, the intermittent
19 nature of wind energy would result in energy produced
20 that would be substantially above a 400 megawatt when
21 loaded, that should be are, when loads are low, and
22 conversely, there could be little or no production when
23 loads are high.

24 And then the last sentence in italics

1 says, For these reasons, we believe a 400 megawatt
2 nameplate limit with respect to UCAP and energy produced
3 from that nameplate capacity is appropriate.

4 If you go to the example in Paragraph 9,
5 which is on Page 5, you see what that sentence is trying
6 to show you.

7 And beginning on the second sentence, if
8 you had a 400 megawatt facility with a 35 percent
9 capacity factor, that's the megawatt hours you would get
10 in a year.

11 But if you have a 600 megawatt facility
12 with a 52.5 percent capacity factor, that was putting 400
13 megawatts per hour to Delmarva, that would result in a
14 lot more energy that Delmarva would have to take.

15 And again, if you assume a wind farm
16 producing that kind of energy at two o'clock at night,
17 Delmarva doesn't have anywhere half of that need, and yet
18 the power is going to be put to Delmarva. They're going
19 to have to pay for it, and they're not going to have a
20 use for it.

21 So, that's why this is a very sort of
22 complex argument, but it has a big significance in terms
23 of whether you base those calculations on 400 megawatts
24 of installed, or nameplate capacity, or whether you allow

1 the calculation to be based off another level of
2 capacity. That's why it makes a difference.

3 COMMISSIONER CLARK: Madam Chair, it
4 will probably dovetail into what you want to talk about.
5 I mean, it goes back to the issue of the concern about
6 the long-term hedging concern of having a contract size
7 like that. But then on the flip side, why not let them
8 bid it so we can consider it. What's the harm in that
9 regard?

10 MR. WILSON: Your Honor, from Delmarva's
11 standpoint, there's a procedural issue here.

12 We view this emergency motion more of an
13 impermissible collateral attack on Commission Order 7066.
14 The time to appeal that order has passed. So, it's
15 improper to appeal it three days before bids are due.

16 Bluewater is not the only party engaged
17 in this RFP. It puts all of the other parties in a
18 compromised position. We're trying to keep this RFP at a
19 particular balance. We're trying to be responsive. And
20 that's what, based on our answer that was given to them
21 both in earlier December and in November, it was in
22 response to questions that were raised.

23 But at this late date, they are now
24 challenging the Commission's order trying to re-open that

1 by this backdoor maneuver.

2 The fact is, the intent of the parties
3 here, Delmarva, the IC, and Staff are in agreement with
4 this interpretation that it was for a nameplate rating.
5 Because what you want to avoid is having huge amounts of
6 excess power put to the customers of Delaware where there
7 is no possible usage for it.

8 So, that's the intent. That is how the
9 documents supporting this RFP reads. And what we see is
10 simply an error for this Commission to unilaterally make
11 a determination that the proper size is 400 megawatts, 24
12 hours a day, seven days a week, being put to the
13 customers of Delaware. That is an issue that should
14 probably be negotiated and come back to this Commission
15 because the dollars are huge. It is north of six billion
16 dollars fully knowing that a good third to two-thirds of
17 that power is going to be surplus. That's inconsistent
18 with House Bill 6.

19 So, just on those bases, the basis of
20 the fact that the Commission has passed an order, 30 days
21 have elapsed, this petition is untimely, it should be
22 denied on that basis.

23 If you want to look underneath the
24 petition, the intent of the RFP, the intent of House Bill

1 6 is to stabilize and minimize costs to customers.
2 Changing this calculation explodes those costs. Day one,
3 it explodes those costs.

4 CHAIR McRAE: Well, I do want to say a
5 few things. And you will have an opportunity to speak,
6 which I will not deprive you of.

7 But I do understand that the issue not
8 in dispute here is how large a project you want to build.
9 I think it's pretty clear you can build a project of the
10 size you desire. The issue becomes what's the measure in
11 terms of what our obligations are on taking. And that is
12 pretty well defined in what was adopted, and, I think, it
13 was referred to when we were talking about the
14 Firestone/Kempton motion for rehearing. There was
15 discussion about the fact that Commissioner Clark adopted
16 the IC's report as a component of the Commission's
17 decision. And there is, and I have so many papers I
18 don't recall the page, but within this report, and I can
19 review it, it does establish what the measure is for the
20 quantity that is to be taken.

21 I'm not sure you're taking issue with
22 the report or the interpretation. I mean, I just need
23 clarification on that. Because the report, I do think,
24 spells out pretty clearly what the expectation is.

1 MR. WILSON: Your Honor, on Page 15 of
2 the IC's report, it was specifically addressed.

3 CHAIR McRAE: I couldn't find the page,
4 but I read it earlier.

5 MR. McGONIGLE: Your Honor, if I could
6 respond to that.

7 The order itself does not use the words
8 nameplate capacity. All of those references that I read
9 in the beginning do not speak to that.

10 CHAIR McRAE: But let me just go back to
11 my question.

12 My question was tied to the fact earlier
13 reference was made to the fact that as part of the
14 Commission's determinations, that the Commission was
15 adopting this report.

16 MR. McGONIGLE: Right.

17 CHAIR McRAE: And within this report is
18 a fairly elaborate explanation of what's going to occur
19 with respect to UCAP.

20 So, I'm trying to understand the basis
21 for the current discussion in light of the support that
22 is established in the IC report.

23 MR. McGONIGLE: There's two points.

24 Number one, the Commission's order is,

1 in my view, inconsistent with the consultant's report on
2 this point.

3 The Commission's order does not mention
4 those words.

5 Perhaps, more importantly, though, if
6 you look at the paragraph that was just cited, Page 15,
7 where this is discussed in the consultant's report, this
8 is a paragraph that deals with mark ups to the term
9 sheet. The consultant's responding to mark ups to the
10 term sheet.

11 Now, if you look at the Commission's
12 order, it addresses term sheet issues starting on Page
13 49.

14 CHAIR McRAE: Let me just get that.

15 COMMISSIONER CLARK: Contract size.

16 CHAIR McRAE: That's the minimum.

17 Maximum.

18 COMMISSIONER CLARK: Is it under maximum
19 contract size?

20 MR. McGONIGLE: Actually, what I'm
21 referring to is on Page 50 of the Commission's report.

22 CHAIR McRAE: Page 50?

23 MR. McGONIGLE: Page 50 of the
24 Commission's order. I'm sorry.

1 In Paragraph 110, it talks about these
2 term sheet issues, which is where this language that
3 everybody is talking about comes from.

4 It says, As we have repeatedly stated,
5 we view our goal at this early stage of the proceeding as
6 opening the process up to as many potential bidders as
7 possible. We believe that making all terms in a term
8 sheet non-negotiable defeats that goals. While we agree
9 that some terms should be non-negotiable, we do not
10 believe that a bid should be disqualified merely because
11 it differs from DP&L's proposed terms in some manner. We
12 support reasonable flexibility in the conduct of the RFP.

13 So, this language that folks are citing
14 is from the term sheet. And the Commission decided that
15 it was not going to make that an exclusionary thing from
16 the outset. It would be part of the evaluation process.

17 CHAIR McRAE: It does clarify for me
18 where you're coming from versus saying that wasn't one of
19 the terms spelled out that you're looking for.

20 COMMISSIONER CLARK: Madam Chair, just
21 one more question, and it was something that was helpful
22 when we were over at Legislative Hall that day.

23 The load curves that Delmarva provided,
24 and not so much the time, but a portion of each day at a

1 minimum, would be under that 400 megawatts. Can you
2 articulate for me why it would be in the best interest of
3 ratepayers and consumers and the company and everyone
4 else involved to be obligated and locked into a 400
5 megawatt contract?

6 MR. MANDELSTAM: I'm glad you raised
7 that, Commissioner.

8 The load curve presumed, as I read it,
9 and I went back and looked at it with my staff, that
10 there was producing, essentially, what we call capacity
11 factor of 100 percent for the purposes of the curve that
12 we were actually producing 400 megawatts in all of those
13 hours. In fact, a wind plant of 600 megawatts with a
14 generally speaking 33 percent capacity factor on any
15 given average day is only producing 200 megawatts.

16 In fact, the plant we're proposing with
17 all of the technical studies we've done, only 22 percent
18 of the hours a year are we actually producing at 400.

19 So, it's a very different profile than
20 the profile that was shown that day in Legislative Hall,
21 which assumes you are producing at full output every hour
22 of the year.

23 And if I may amplify on that point, but
24 I want to be responsive.

1 COMMISSIONER CLARK: That's fine.

2 MR. MANDELSTAM: I think if I may, a
3 little history is in order.

4 When we look back at all of the records
5 as we have, and we look at the meeting, which I'll quote
6 from in a minute, and we look at the Commission's report,
7 the consultant's report, rather, and then we look at the
8 vote taken on October 17th, that long hearing with all of
9 us there, I think it becomes quite clear that Delmarva
10 intended, in its original proposal, to have a project of
11 200 megawatts, such that a developer could produce up to
12 200 megawatts in any given hour.

13 In those early days, August 18th, the
14 meeting that Chair McRae was on the phone, Phil Cherry
15 was here, Bruce Burcat, all of the gentlemen from
16 Delmarva were here, they talked about 200 megawatts
17 around the clock at any given hour. I'll quote that in a
18 minute. And then, there was discussion back and forth
19 and comments.

20 And then, after a long day, you folks,
21 in your wisdom, in Issue 1, voted on the project size.
22 And you increased it from 200 to 400. You never talked
23 about capacity factors or nameplate. You never de-rated
24 the plant, so that you allowed developers, such as

1 Bluewater to deliver in any given hour 400 megawatts.

2 And I can quote from Mr. Finfrock, if I
3 may. Our RFP identified "new," to be anything that would
4 provide net increase in capacity on existing facilities
5 or a new facility to be constructed within the State of
6 Delaware.

7 The in service date. The in service
8 date has to complement the ability to build some baseload
9 assets.

10 You'll recall that the legislation and
11 the original PSC order talked about additional capacity
12 to baseload.

13 What Bluewater has done with it's 600
14 megawatt project is try to look like a 200 megawatt
15 baseload to the best of its ability.

16 The Bluewater hallmark is to try to be
17 responsive to you. A 600 megawatt project with a 33
18 percent capacity factor on an average day will look like
19 a 200 megawatt baseload. And Mr. Finfrock goes on.

20 We looked at baseload assets as being
21 coal, and we wanted to have a timeline that would allow
22 for all of the permitting requirements and the
23 construction of a coal facility, and we also wanted the
24 plant to go in service before a summer period, so we

1 picked June 1st, 2013, all of these things will be
2 incorporated in the final order, to allow for some more
3 round the clock energy or energy that could be provided
4 every hour of the day, like a coal unit could do.

5 Megawatt size. Part of the legislation
6 requires that under the IRP, that 30 percent of the
7 sourcing of supply for standard offer service must come
8 from the wholesale market through bid and auction
9 process. That's a requirement.

10 So, you carve that out and say, Well,
11 what's left to be serviced through other alternatives?
12 And our load requirement or our -- the customer need
13 under our standard offer service is, on average, about
14 400 megawatts for every hour.

15 Bluewater will rarely deliver what, in
16 fact, the company wants, 400 megawatts in any hour.

17 Our requirement for every hour per day,
18 if you look at that 30 percent rule, you are somewhere
19 south of 300 megawatts to allow for this RFP to
20 participate, and we recognize that we want something that
21 potentially could provide us energy every hour or every
22 day, which is what we term as our baseload need, and
23 that's 200 megawatts.

24 So, we sized the maximum of this RFP to

1 meet the requirements of our customers.

2 Then you, in your wisdom, changed that
3 from 200 to 400 and Bluewater responded with a 600
4 megawatt project that exactly meets their original needs.
5 200 megawatts on average in any given hour.

6 I can quote from Mr. Wilson in his
7 comments back to you where he talked about similar
8 numbers. The problem here is that people in the energy
9 industry, when they want to be precise, talk about
10 megawatt hours. But when we talk about 400 megawatts, my
11 clear understanding, and we can have our electrical
12 engineer confirm this, we're talking about 400 megawatts
13 in any given hour.

14 So, I think it's an honest confusion,
15 perhaps, in nomenclature, but clearly, if we look at the
16 RFP, and the PPA, and the number of returns and your vote
17 on the record on October 17th, you intended to allow any
18 developer to produce up to 400 megawatts in any given
19 hour, which is what the company originally wanted at the
20 200 megawatt level, but then you chose to increase it.

21 MR. WILSON: Your Honor, if I may
22 respond.

23 CHAIR McRAE: No. I first want to
24 comment in terms of, I spent considerable time trying to

1 understand UCAP, which I do appreciate has a difference,
2 significance in, up to 400 megawatts that UCAP impacts
3 what output is required in. I rather thought that was
4 part of the understanding.

5 I'm still trying to sort out where we're
6 going with this. But clearly UCAP was a factor. It
7 appears to be, what a question now is, should UCAP, or
8 nameplate be a consideration. But it was, certainly, in
9 the earlier discussions and in the document and in the
10 report.

11 MR. MANDELSTAM: Exactly, Madam Chair.
12 We have our electrical engineer who can speak to this. I
13 can speak to it generally.

14 CHAIR McRAE: Well, before that happens,
15 though, I think Mr. Wilson wanted to offer a comment, and
16 then I will go to your engineer.

17 MR. FINFROCK: This is Mark Finfrock. I
18 was quoted in the discussion.

19 When the company proposed 200 megawatts,
20 we did propose it around the clock, because we assumed
21 that being the maximum size, we could use all 200 every
22 hour of every day. It did not mean that we could use 400
23 one hour, 100 the next hour, 350 another hour where it
24 averages 200. That's a different dynamic.

1 So, we do not agree with there's a
2 relationship between our 200 megawatts, which is more
3 firm around the clock, than a wind project that it could
4 have variability around the deliverable. So, there is
5 not a connection.

6 I wanted to make sure that's clear.

7 MR. MANDELSTAM: Did the nomenclature
8 change in the official record?

9 MR. WILSON: When this Commission made
10 its decision, they adopted things that were recommended
11 by the IC.

12 So, you cannot go back to Delmarva's
13 original proposal for firm energy at 200 megawatts and
14 compare that with this unstable energy coming across at a
15 400 megawatt block. So, you're speaking apples and
16 oranges.

17 And again, if you're citing back to the
18 Commission's decision, 30 days have lapsed. This
19 procedurally is improper.

20 MR. MANDELSTAM: With all due respect --

21 MR. GEDDES: You must be recognized.

22 CHAIR McRAE: Excuse me. Thank you very
23 much for helping me out, Mr. Geddes.

24 Behind you, Mr. Firestone has been

1 raising and waving to get into this discussion. So, if I
2 may, and then we will get back to this.

3 MR. FIRESTONE: Thank you, Madam Chair.

4 Just, briefly, on a couple of the points
5 that have been raised.

6 First, again, on the IC's report, it was
7 adopted only to cover issues that weren't explicitly
8 covered. There was an explicit debate on the 400
9 megawatts. And so, again, in our view, whatever the IC's
10 report is on this issue is irrelevant.

11 Secondly, as far as the timing, I would
12 submit that, one, this, to me, seems more like a motion
13 for clarification than a petition for rehearing. But
14 even if it wasn't, this Commission amended Order 7066.
15 With a subsequent order, some time in late November,
16 whatever they filed was within 30 days of that, and in
17 the earlier action that this Commission just took, I
18 understood it was agreed that, essentially, because of
19 our petition, the finality of that order was stayed until
20 just when this Commission just issued and signed this
21 denial of rehearing. And so, that order was not final
22 until just before this motion was heard. Thank you.

23 CHAIR McRAE: Well, I must respectfully
24 disagree with your conclusion with respect to what

1 happened with respect to this report. I'll go back
2 Bluewater on that. But I must say, I did not interpret
3 the action to be what you said or proposed.

4 MR. GEDDES: Point of clarification at
5 the appropriate time.

6 CHAIR McRAE: Yes, Mr. Geddes.

7 MR. GEDDES: Thank you, Madam Chair.

8 I think, again, and I want to caution
9 the Commission, it is the Commission's order. And there
10 are portions of it that I think -- certainly, the report
11 is clear as to what was intended. The report was
12 adopted, and one could argue that Staff's interpretation
13 and the company's interpretation is correct.

14 There is a contrary view that it is not
15 clear, and there have been some citations where, perhaps,
16 with more reflection, it might have been clearer. But at
17 the end of the day --

18 CHAIR McRAE: I agree with that.

19 MR. GEDDES: -- it's still the
20 Commission's order. And the Commission needs to decide
21 whether it believes that it is clear, and then tell the
22 parties to go forth, or the Commission can clarify what
23 it meant in the order.

24 CHAIR McRAE: Well, I would definitely

1 say in the ideal, the term sheet and the RFP should have
2 reflected specifically what was addressed in this IC
3 report.

4 But I have no recollection at any time
5 of the Commission rejecting the proposed application of
6 nameplate UCAP, regardless of what number was involved,
7 whether it was 200 megawatts or 400 megawatts.

8 The process of determining capacity, I
9 don't recall the Commission negating in that discussion.

10 MR. GEDDES: Point of clarification. I
11 believe the term sheet is clear on this point.

12 MR. MANDELSTAM: Madam Chair, if we
13 could move to UCAP because there are two issues, and I
14 apologize. It's very complicated.

15 My point about what the Commission
16 specifically adopted on the issue sheets and the specific
17 votes relative to contract size, you took the existing
18 200 megawatts and increased them to 400, but there's a
19 wholly separate issue of UCAP, and I think we can talk
20 about that now. And I'm going to turn that over to Lex
21 Grier.

22 MR. GRIER: I'm Lex Grier. I'm
23 Vice-president of Downes Associates.

24 Just to help -- I hope to help you

1 understand what UCAP is.

2 UCAP is a value which is determined by
3 PJM, who is the system operator that controls the region,
4 to qualify generating units as to their ability to meet
5 peak demand for load-serving entities.

6 All load-serving entities, such as
7 Delmarva Power, are required to have designated to them
8 sufficient capacity to generate their peak demand, plus a
9 reliability factor.

10 This factor is determined based upon PJM
11 rules. It has nothing to do with the RFP, or the
12 contract, or Delmarva's determination, or even the
13 Commission's responsibilities. It is determined based
14 upon Manual 21 of PJM's operating rules.

15 Second point is this matter that it is
16 required for sufficient capacity to meet the peak load
17 demands. In other words, there's a reliability concern
18 that there is enough generators on line or available to
19 meet peak demand as projected for any given year.

20 So that brings me to a third point. It
21 is an annual determination. It has nothing to do with
22 hourly usage rates, other than the fact that some of
23 those hours determine what the peak demand is.

24 But the point is, it is not adjusted on

1 an hourly basis. It is not adjusted on a monthly basis.
2 It is an annual determination based upon the performance
3 of a generating unit.

4 Another point is that it is totally
5 separable from energy. The amount of energy produced in
6 any given hour is a saleable commodity. The amount of
7 UCAP is saleable commodity. It is not tied to a specific
8 amount of energy that is being produced.

9 CHAIR McRAE: I understand.

10 MR. GRIER: Thank you. I guess the most
11 important point here is that Bluewater Wind's facility,
12 when we looked at historical data, wind data on sites
13 that we were determining, looking at, that over the last
14 three years, it has been expected that the UCAP capacity
15 would be under 200 megawatts. There's no reason, it
16 seems to us, it's really unfair to limit the UCAP that is
17 available for sale since it is completely separable from
18 the energy requirements. It's unfair that it be limited
19 to two-thirds of a 600-megawatts project -- what's
20 determined from a 600-megawatt project. It should be
21 based upon how much Delmarva needs, which is somewhat
22 less than 400 megawatts.

23 MR. MANDELSTAM: Madam Chair. Could I
24 ask a question for the record of both Delmarva and the

1 independent consultant. What they feel the official PJM
2 UCAP determination of a 600 megawatt offshore wind
3 project is?

4 MR. GEDDES: Would you like Staff to
5 answer that?

6 CHAIR McRAE: Yes. As well as Delmarva.
7 Yes to both of you.

8 MR. SHEINGOLD: I will address that
9 question.

10 Again, by the way, I agree with
11 everything that Mr. Grier said.

12 According to the PJM Manual, initially,
13 UCAP is going to be 20 percent of the net capability or
14 nameplate generator rating of the plant. After that,
15 when you have actual operating experience, what they will
16 do is look at the actual energy production during three
17 to seven p.m. in the summer peak period and calculate
18 what that energy production is, the capacity factor of
19 that relative to the 600 megawatts. And it is that
20 capacity factor multiplied by the nameplate rating that
21 will give you the UCAP.

22 MR. MANDELSTAM: Let's take a very
23 clear, precise example.

24 In the first year of full operation of a

1 600 megawatts wind project, in your professional opinion,
2 PJM will define our UCAP as how many megawatts?

3 MR. SHEINGOLD: The first 600 megawatts,
4 it will be 120 megawatts of UCAP.

5 MR. MANDELSTAM: Does Delmarva concur?

6 MR. FINFROCK: Actually, I was going to
7 say between 120 and 180 because I thought it was a 30
8 percent cut.

9 MR. MANDELSTAM: Madam Chair, I believe
10 we have a rare moment of agreement. I think that the
11 parties can stipulate that this issue has resolved
12 itself.

13 CHAIR McRAE: Well, I wish that were
14 true. I see them all looking quite stunned.

15 MR. MANDELSTAM: I apologize, Madam
16 Chair.

17 If PJM defines UCAP, let's say, as 120
18 megawatts in year one, which is 20 percent of 600, and
19 all of the parties are agreed, then under the RFP, and
20 under PJM rules, we're allowed to sell 120 megawatts of
21 UCAP.

22 Does anyone disagree with that?

23 MR. SHEINGOLD: You're able to sell 120
24 megawatts of UCAP, but not to Delmarva. If I can --

1 MR. MANDELSTAM: Why is that?

2 MR. GEDDES: Go ahead, Mr. Sheingold.

3 MR. SHEINGOLD: The term sheet is
4 specific in defining maximum amount of contract capacity
5 of 400 megawatts. And contract capacity is defined as
6 net capability, which for a wind plant is going to be the
7 nameplate generator rating.

8 And it also says that you can sell UCAP
9 from the contract capacity, which can be up to 400
10 megawatts of nameplate or installed capacity. It's
11 synonymous.

12 So, while I agree with you that under
13 PJM rules you can sell 120 megawatts of UCAP, that under
14 the RFP, you can sell 80 megawatts, which would be 400
15 megawatts times that 20 percent.

16 MR. MANDELSTAM: Why is it that Delmarva
17 is able to redefine UCAP? I don't understand.

18 MR. SHEINGOLD: Delmarva does not define
19 UCAP. This really goes to the contract size issue, which
20 is what is required to purchase under the RFP.

21 And I will admit that the instructions
22 to bidders, which is referenced by Bluewater, is really
23 not clear on this point. It talks about capacity. I
24 think we meant install capacity or net capability in that

1 paragraph that was quoted.

2 But the term sheet, which is really
3 intended to be more specific, is specific on this point.

4 And, of course, in the consultant's
5 report, when that specific issue was addressed to us, we
6 were very specific in how it should be treated.

7 MR. MANDELSTAM: We're just looking for
8 the term sheet, Madam Chair.

9 CHAIR McRAE: Okay. While they are
10 looking, Commissioners, do any have any comments or
11 questions at this point? In fact, you can look a little
12 longer. Can I have a three-minute break while you are
13 looking?

14 MR. MANDELSTAM: Thank you, Madam Chair.

15 (A break was taken at, approximately,
16 3:55 p.m.)

17 (Back on the record at, approximately,
18 4:00 p.m.)

19 CHAIR McRAE: We're back on the record.

20 MR. GEDDES: Madam Chair, I believe
21 Mr. Wilson and Mr. Finfrock had a point of clarification,
22 if they might.

23 CHAIR McRAE: No. I believe we're back
24 to Bluewater.

1 MR. MANDELSTAM: Madam Chair, the
2 company can go next.

3 MR. WILSON: Your Honor, in our earlier
4 conversation, we talked about a response that was
5 submitted to the bidders in an attempt to clarify this
6 point. And I just want to enter that in the record. It
7 is already on the web site. But it is dated 11/28/06.
8 It is Question No. 64, For clarification, does the
9 limitation of "400 megawatt of capacity, energy and
10 ancillary services" as stated in Section 1.1
11 Introduction, Subsection 2, controlling in the event that
12 a facility's full nameplate rating exceeds 400 megawatt?

13 The answer was, 400 megawatts is the
14 maximum allowed limit for any product under the RFP. For
15 a project with installed net capability in excess of 400
16 megawatts, the energy and capacity limit would be based
17 on the installed net capability of a project to which
18 Delmarva would have an entitlement, i.e., the Seller may
19 (a) provide up to 400 megawatt of energy from a
20 percentage of the entire project, as long as the
21 percentage multiplied by the installed net capability of
22 the project does not exceed 400 megawatts, or (b) provide
23 up to 400 megawatts of energy from a portion of the
24 project that is separately metered or accounted for,

1 where the portion of the project does not exceed 400
2 megawatts of installed net capacity. Intermittent
3 renewable energy projects may sell UCAP to Delmarva from
4 up to 400 megawatts of the project's installed net
5 nameplate capability.

6 This question was asked, and it was
7 answered on November 28, 2006.

8 CHAIR McRAE: Here we are December 19th.

9 MR. WILSON: So, at this time, we would
10 just move this into the record the statement that I just
11 showed.

12 MR. MANDELSTAM: I'll note for the
13 record, it is already in the record, Madam Chair.

14 CHAIR McRAE: Well, thank you for your
15 help.

16 CHAIR McRAE: Now, given that
17 circumstance, I guess, here we are again with, Why are we
18 here? I mean, if there was an issue with the answer,
19 what is the problem now?

20 MR. MANDELSTAM: Well, of course, there
21 are a lot of things that we can say about the answer. In
22 some parts, it's ambiguous. In some parts, we think it
23 was contrary to the RFP, the PPA, the net commercial,
24 nonnegotiable terms, and most importantly, the PSC's

1 orders and votes as it relates to project size and the
2 PJM definition of UCAP.

3 Well, obviously, we received this
4 answer. We tried to read and understand it. We looked
5 at the totality of everything that is going on. And we
6 are here today.

7 CHAIR McRAE: All right. Did you look
8 at it in the context of what was in the consultant's
9 report? I mean, in your consultations of various --

10 MR. MANDELSTAM: Of course, Madam Chair.
11 We relied upon the actions of the Public Service
12 Commission as the determining body in this proceeding.

13 CHAIR McRAE: Which this was a part of
14 the actions of the Public Service Commission.

15 MR. MANDELSTAM: Correct. We believe
16 that, as Mr. Geddes has articulated, and we certainly
17 agree that there was some ambiguity, there were some poor
18 instructions. And I was there, as you know, Madam Chair,
19 because you properly chastised me for asking too many
20 questions, which I do and I apologize. When we debated
21 and voted on Issue 1, you reviewed the various positions
22 of Staff, which was the independent consultant, Delmarva,
23 and, of course, Bluewater and all of the other parties,
24 and then you voted to increase it to 400 megawatts, which

1 takes the Delmarva position of 200 megawatts in any one
2 hour and increases to 400 megawatts in any one hour.
3 There was no other change in nomenclature. No other
4 change, and as I said the words, installed capacity. It
5 doesn't appear in any of those documents.

6 So, the fact that installed capacity
7 appears in answer to Question No. 64 seems to us doesn't
8 carry a lot of weight because after all, it is contrary
9 to all of the other documents that we relied upon.

10 CHAIR McRAE: But I do have to say this.
11 Again, I'm speaking solely for me. By upping the
12 numbers, we really didn't change the observations that we
13 adopted in the IC's report.

14 And I personally spent a lot of time
15 trying to understand UCAP and its application because I
16 understood it to be a part of the agreement.

17 MR. MANDELSTAM: It is, Your Honor.

18 What is interesting is, the UCAP from
19 our project in the real world at the end of the day will
20 be exactly what Delmarva originally wanted. It will be
21 200 megawatts of UCAP. So, I'm surprised that they think
22 that it's smaller number when it is, in fact, what they
23 originally wanted.

24 MR. GEDDES: May I be heard, Madam

1 Chair.

2 CHAIR McRAE: Yes.

3 MR. GEDDES: Members of the Commission.

4 I think there's a practical issue here,
5 as well, and that is, since the 28th of November,
6 everyone has known how this was to be interpreted. And
7 that other bidders have relied on that answer to that
8 particular question and have bid accordingly.

9 And if the Commission were to change the
10 rules now, the question is, Well, what about the other
11 bidders? And would we now have to go back and revise or
12 allow them to rebid all of their matters or units.

13 So, I think there is a practical problem
14 here, as well, in terms of any change from the time of
15 that answer to that particular question. I think
16 everyone was on notice. Whether you agree with it or
17 not, that was the way it was going to be administered.
18 And I think that should be taken into consideration,
19 whatever the Commission decides to do.

20 MR. MCGONIGLE: Madam Chair, just a
21 couple of points.

22 I think what we have here is, we have
23 some conflict with these documents. We have a 100-page
24 order from the Public Service Commission, which does not

1 mentioned installed nameplate capacity.

2 We have an RFP that does not mention
3 installed nameplate capacity. We have a consultant's
4 report that mentions it in the context of a mark up to a
5 term sheet from Bluewater. That's where this supposed
6 clarity comes from.

7 And in response to that, the PSC said,
8 We are not going to make those term sheet issues
9 nonnegotiable. We are not going to do that because we're
10 going to go with this big funnel approach.

11 And it just seems, to me, on balance,
12 given the PSC's overwhelming view that they wanted the
13 big funnel approach here, that you ought to let folks
14 submit their bids and get to the evaluation process and
15 not --

16 CHAIR McRAE: Well, I was actually going
17 to go back to Mr. Geddes on that, that language, and
18 whether, in fact, since people may have construed this
19 all different ways, and we've gotten one set of
20 participants who have arrived at a conclusion, why could
21 we not do that. We don't know how anyone who has not yet
22 bid or not filed, we don't know how they interpreted the
23 language because they're not before us.

24 MR. GEDDES: Well, I think, Delmarva can

1 probably clarify the process. But they have looked at
2 some prebid materials and have sent out letters to
3 potential bidders illustrating or at least commenting on
4 some concerns.

5 The interrogatory or the question
6 response is up on the web page. So, I think there is
7 some uniformity how the process has been administered,
8 but I would ask the company to comment on that.

9 MR. FINFROCK: I can provide a little
10 bit of commentary to that.

11 We haven't received any bids other than
12 Bluewater's bid today.

13 But with the way we structured the RFP
14 and the term sheet, which is the component of the RFP, it
15 was reflective of 400 megawatts being the max and the max
16 of net installed capacity.

17 And the reason I say that is because if
18 someone bids a fossil facility, there is an obligation
19 for that fossil facility if it's 400 megawatts, be able
20 to ramp; in other words, be able to produce less in hours
21 with the recognition which is a concern of oversupplying
22 the customers. That was consistent with the nameplate
23 capacity for wind projects.

24 We are not being indifferent here. We

1 are being consistent. And to move off of that
2 consistency, I would think is a problem.

3 CHAIR McRAE: Commissioner Winslow.

4 COMMISSIONER WINSLOW: Go ahead,
5 Mr. Mandelstam.

6 MR. MANDELSTAM: Go ahead.

7 COMMISSIONER WINSLOW: I insist, please.

8 MR. MANDELSTAM: Well, we, obviously,
9 disagree with that interpretation.

10 And we think that the Commission has
11 focused on this issue. We have gone back and forth here.
12 We, obviously, spent a great deal of time and money. And
13 I would just correct the record, we have submitted an
14 initial submission, as provided in the RFP and have not
15 submitted a final submission, which under the terms of
16 the RFP, can be wholly changed if we so choose. Just to
17 change the record.

18 We, obviously, have relied in good faith
19 on what we believe to be the preponderance of the common
20 sense reading of all of these documents. We spent a
21 great deal of money and time. We are trying to produce a
22 project that is for the benefit of Delaware. We have
23 looked at the Commission's orders, the various hearings,
24 the statements of the company in the initial meeting to

1 try to do something that is wanted. To try to provide
2 baseload power or something for it. And I make note to
3 what you commented about overproduction and
4 underproduction and dispatchability. That was
5 specifically exempted in the order in the RFP for
6 intermittent unit contingent generators like wind.

7 So, we appreciate the distinction made
8 by the Public Service Commission for wind generation and
9 its other different, and we would argue, beneficial
10 characteristics.

11 COMMISSIONER WINSLOW: When I thought
12 about this and voted on this, Mr. Geddes in his argument,
13 was very convincing. I thought the big funnel approach
14 was the way to go. I mean, why not consider everything?
15 Why not consider wind? Why not consider other
16 alternatives? Why not consider ITCC? Why not have a
17 full plate from which to select?

18 On the other hand, I understood that
19 there were certain capacity issues and demand issues that
20 were on the table, too, and that price stability was one
21 of the issues. That was in the mix.

22 But my clear intent was wind be in the
23 mix and on the plate and to be considered and only be
24 kicked out as part of the evaluation process.

1 And so, my feeling on it is, there's
2 probably, and I don't know, I can be corrected on this, I
3 have no idea as to what's happening with respect to
4 people and how much and how many megawatts they're
5 proposing. But I'm willing to bet there's probably not
6 too many people proposing 600 megawatts because of the
7 demand issues and what Delmarva has pretty forcibly
8 stated in their presentation what their desires are.

9 So, I would be in favor of letting the
10 bid come in and be made part of the evaluation process,
11 so I can listen to the positives of the wind issues and
12 look at the costs and weigh it and count them in terms of
13 my decision making process.

14 Now, I recognize that there are problems
15 with the process, and, I think, Mr. Geddes rightfully
16 brings it up, and Delmarva rightfully brings that up.

17 But as the Chair has pointed out, I
18 think there has been legitimate controversy or just
19 legitimate disagreement over some of the language. And I
20 think that we should let it go forward and let them make
21 their bid consistent with what they've stated. Maybe I
22 am dead wrong.

23 And, quite frankly, if you are propose
24 something that we can't afford to pay for, we're going to

1 just say no to you.

2 CHAIR McRAE: Are there any other
3 comments on this matter? I do think we have kind of gone
4 around and around on it.

5 MR. CHERRY: A question for Mr. Geddes.
6 You talked about the other bidders.

7 But as I understand this UCAP issue,
8 isn't the issue for Bluewater sort of unique to
9 intermittent wind projects? I mean, does this very same
10 issue impact somebody else who may want to bid in a 600
11 megawatt coal plant?

12 MR. GEDDES: Go ahead.

13 COMMISSIONER WINSLOW: If I could, I
14 think, yes, it is the same. If it's a 600 megawatt coal
15 plant or a 600 megawatt wind plant, I think it is the
16 same. This issue is the same.

17 I guess my point is that I don't believe
18 that anybody, maybe I'm just way out in left field, I
19 don't know that anybody is going to be bidding a 600
20 megawatt coal plant.

21 MR. GEDDES: I think it's the same,
22 except the affect on ratepayers potentially could be
23 different. I think that's the real issue. And that
24 there could be more off-peak power that's being put to

1 Delmarva in one scenario versus the other.

2 COMMISSIONER WINSLOW: The evaluation
3 process, wouldn't we be fully aware of that? Look,
4 Bluewater, how in the world can we possibly buy all of
5 this power at two o'clock in the morning when we don't
6 need this power. We can't accept this situation. And, I
7 guess, maybe I was sold on the big funnel issue and the
8 larger issues, and, perhaps, didn't focus on some of the
9 groundwork there. Because, obviously, there are several
10 layers here.

11 But I wanted, frankly, the wind to be
12 part of the mix for consideration, even if it was going
13 to be rejected. That was my intent. I don't think
14 that's inconsistent with what --

15 MR. GEDDES: I don't think it is.

16 CHAIR McRAE: Well, I think the only
17 issue, and I do like the direction -- that's,
18 essentially, what I was asking, can we just proceed and
19 deal with this in the wash.

20 I was hearing from Mr. Geddes that
21 that's not possible because other bidders would be
22 prejudice.

23 MR. GEDDES: I was, perhaps,
24 misinformed. I thought that there was more prebid

1 information where this response had been given to others.

2 To the extent that the documents can be
3 read in different ways, and people bid based on their
4 interpretation of the documents, I think the Commission
5 is right. It will, at the end, be sorted out. It may be
6 apples and oranges in terms of what ultimately is bid.

7 But, I think, there are some arguments in favor of
8 interpreting it this way because of the potential impact.

9 And, certainly, you've heard some argument as to why
10 people can take a different position, based on the
11 documents. So, obviously, I can't argue with whatever
12 the Commission decides.

13 MR. WILSON: Your Honor.

14 CHAIR McRAE: Yes.

15 MR. FINFROCK: Can I add one more
16 comment to Commissioner Winslow's proposal? And that is,
17 the evaluation process captures some issues.

18 But recognize, there are some fixed
19 components of that evaluation process.

20 For example, price instability has so
21 many points associated with it. And there are already a
22 lot of evaluation process to establish what is
23 instability with respect to a bid.

24 Now, we're adding a significant

1 additional component to something that's only giving 20
2 points.

3 And my only comment is, I'm not sure if
4 the evaluation process, as it was structured for maximum
5 400 megawatt installed capacity bid, may be sufficient
6 now to have a bid that potentially is 600 or 700
7 megawatts. It potentially changes the mechanics of the
8 evaluation and the point assignment to instability.
9 Because we only have 20 points, that captures a lot of
10 other issues with instability.

11 CHAIR McRAE: Let me ask, would the bid
12 be 600 megawatts?

13 MR. MANDELSTAM: No, Your Honor.

14 CHAIR McRAE: But that's what you said.
15 And I didn't understand them to say that.

16 They can have a profit that's larger
17 than 400 megawatts. As I read all of their documents,
18 they were not saying their bid would be 600 megawatts.

19 COMMISSIONER WINSLOW: Madam Chair.

20 However, that same day, I opposed the
21 independent consultant's recommendation with respect to
22 some of the things that the Commission could use to get
23 off the hook. I voted against that. And the Commission
24 was much wiser than me in my opinion in that area.

1 So, it's my understanding that we do
2 have latitude to get off the hook in this process,
3 unless, once again, I'm mistaken on that issue.

4 CHAIR McRAE: Well, I think you were on
5 the right track when you said let it come in. I am very
6 willing to entertain a motion. And I think there's
7 clarification that they're simply pointing out, as I
8 understood Bluewater's writing, that they can build
9 whatever capacity they choose. Our commitment is tide to
10 up to 400 megawatts limit.

11 MR. WILSON: Your Honor, I'm sorry.

12 CHAIR McRAE: Go ahead.

13 MR. WILSON: I guess we are unclear as
14 to how they properly bring this before you.

15 CHAIR McRAE: Well, I think, and it has
16 not been put in the form of a motion, but what I heard
17 Commissioner Winslow say, which was, essentially,
18 something that I had attempted, or I considered earlier
19 is to allow the bid to come in. It's not that there has
20 been all of these other bidders and evaluate the bid, as
21 you would all other bids, around our exposure. I mean,
22 that strikes me.

23 MR. WILSON: There is a fundamental
24 fairness question in that these responses have been

1 posted and other bidders are making their determination
2 based on what's been posted. And what is posted is not a
3 Delmarva posting. It was approved by Staff and the IC.
4 We're not operating in a vacuum by ourself. And now,
5 you're changing the rules that may impact someone else.

6 CHAIR McRAE: Well, I'm not exactly sure
7 I'm changing the rules because it strikes me that there
8 was some issue around clarity of the rules here so that
9 everybody that is responding may interpret -- you know --
10 I could have another Bluewater interpretation, it sounds
11 like to me.

12 Did you have something to say?

13 MR. GEDDES: Point of clarification.

14 Mr. Sheingold would like to, at least,
15 comment about, if the Commission agrees with this motion
16 that it creates some questions, and, I think, perhaps,
17 you heard some of the questions. It may help in terms of
18 how you do the evaluation.

19 CHAIR McRAE: Let's hear that.

20 MR. SHEINGOLD: Well, I think initially
21 there is a question of whether the bid would be allowed
22 as a nonconforming bid to be evaluated, or do the rules
23 for all bids have to be changed, therefore, to allow
24 anyone to bid. And I don't know what the limits are in

1 terms of capacity and energy. There are contract size
2 limits. Are there limits to be eliminated? Are the
3 limits to be waived for this bid, and it can be evaluated
4 that there is a nonconforming bid?

5 Some of these issues ought to be
6 addressed because there are questions not only with
7 regard to how Bluewater's bid has been treated, but with
8 respect to other bids, as well.

9 CHAIR McRAE: Okay. Let me just ask.
10 What happens if, because the other bids aren't there yet,
11 what happens if you find that people have looked at this,
12 and someone else came up and looked at it the same way
13 Bluewater did? How are we handling it? Are we dumping
14 them all as nonconforming, which impacts the funnel? I'm
15 not quite sure.

16 MR. SHEINGOLD: The only information
17 that we have is the notice of intent to bid. And there
18 were three others. And there's a 400 megawatt from a 630
19 megawatt plant. There's 580 megawatt plant. And there
20 are two potential alternative bids, both of which are
21 under 400 megawatts. So, that is what we have.

22 Now, with regard to the statement that
23 the RFP did not state clearly what the limits are. The
24 limits are at the term sheet. It says, 400 megawatts of

1 contract capacity, which is based on net capability.

2 Now, net capability which is a term of art, is the same
3 as installed capacity.

4 So, I just want to state for the record
5 that the potential that that wasn't clearly stated, I
6 thought that it was, and we were very consistent in terms
7 of answering the questions and the answers, et cetera.

8 CHAIR McRAE: I would have to trust that
9 it's a term of art. I wish I had the sophistication to
10 say with certainty.

11 MR. SHEINGOLD: I want to get back to
12 your question about how --

13 MR. MANDELSTAM: Point of information,
14 Madam Chair. I apologize.

15 We read carefully the definition of net
16 capability, and if we could go to that, I'm not sure that
17 I would take exception to his definition. It's defined
18 in the PPA, if I may read.

19 Net capability means --

20 COURT REPORTER: Mr. Mandelstam, please
21 slow down.

22 MR. MANDELSTAM: I'm sorry. My
23 apologies.

24 CHAIR McRAE: What are you looking at?

1 MR. MANDELSTAM: The Power Purchase
2 Agreement. He said it was a defined term. It is, in
3 fact, Madam Chair.

4 So, this is the Delmarva Standard Form
5 Power Purchase Agreement to Delmarva and Seller. It's on
6 the web site. Page 10. Net capability means as of any
7 time, the number of megawatts of energy, which can be
8 delivered by the units, as determined under conditions
9 and criteria specified in PJM Manual for rules and
10 procedures for determination of generating capability
11 Manual M21, Revision 01, effective date August 23, 2000,
12 as amended from time to time.

13 It is that document, as Mr. Grier, has
14 said, that talks about a rating for a 600 megawatt
15 project of initially 120 megawatts ramping up to the
16 capacity factor.

17 So, we would argue, in fact, that argues
18 for the Bluewater point.

19 MR. SHEINGOLD: Excuse me.

20 MR. GEDDES: Go ahead.

21 MR. SHEINGOLD: I think within that, net
22 capability is defined for wind plant as the nameplate
23 rating minus the station load. I have a document from
24 PJM that states that specifically.

1 CHAIR McRAE: Within that reference
2 document, then?

3 MR. SHEINGOLD: And then it goes onto
4 say that the capacity value or capacity credit for wind
5 is, basically, the UCAP, according to the same
6 methodology that we all agree on, which is discussed in
7 that specific manual.

8 I got a document from PJM that shows how
9 that works -- the difference between net capability and
10 the capacity credit of UCAP.

11 CHAIR McRAE: Well, it seems to me that
12 the document is there that can clarify all of this, and
13 it's referenced in the PPA, then, I guess, you can track
14 it back to the document and that would govern.

15 Mr. Citrolo, did you have your hand up
16 to add something on this?

17 MR. CITROLO: Yes, Madam Chair. Thank
18 you. I have a few comments, mostly general, and a couple
19 of specifics.

20 I told Mr. Padmore we should have spoke
21 up on the customer service document and we wouldn't feel
22 compelled to comment on this one.

23 But I want to go all the way back to
24 August in an attempt to, hopefully, put this Commission

1 back on the slope that Commissioner Winslow just stated
2 earlier, and that is to continue with the open funnel
3 approach.

4 In our comments back in August, most of
5 the issues that were discussed today and some of the
6 parties have been filing late, just letters that you see
7 in regards to the docket, we did raise back in August.
8 Things such as looking at the overall environmental
9 policy that the legislature has and some other statutes
10 in addition to this one, as well as the size. In fact,
11 the specific question I asked of NRG was the fact, we
12 feel, and I believe it was in the Staff's report that the
13 size limit was raised, primarily, for economic conditions
14 and NRG raised. It said, No one would build a 200
15 megawatt facility. It's uneconomical. We need to build,
16 at least, 600. And Staff came up with 400.

17 Once again, you have access to
18 engineers. We have a graduate with us for our
19 engineering issues. Mr. Padmore is a J.D. for the legal
20 issues. I don't want to raise any of those with you.

21 But what I want to go back to say, I'm
22 approaching my fifth year here now with the office. I've
23 been part of, probably, half a dozen or so task force.
24 Renewable Energy. The Governor's Energy Council. Also,

1 through the Delaware Energy Office, we review the
2 proposals that come to the Green Energy Fund. Technology
3 demonstration of renewables. Research projects. Things
4 that are still on the chalkboard. I participated. And
5 as a member of PJM, as a member, we also participated in
6 what's called the Public Interest Energy Users Group,
7 which talks about renewables. And, in fact, some
8 recommendations from that committee years ago softened
9 some of the interconnection standards for renewable type
10 power to get on the grid.

11 I've also been to GATS training, which
12 you all know about, with our RPS statute, which, I
13 believe, can track someone's output of their solar
14 hotwater heater, if they want to.

15 My wife has told me when the alarm clock
16 goes off in the morning, I say the word renewable energy.
17 And then I find ourselves here. And here is a renewable
18 energy provider who has come down here several times
19 trying to provide us with renewable energy. It's not
20 chalkboard project. It's not a demonstration project.
21 It works in other areas that we saw from their
22 presentation.

23 We softened some of our positions, once
24 the Commission did adopt the open funnel approach.

1 If you recall, we respectfully disagreed
2 with several things that are in your order. We did not
3 ask for reconsideration. But we still would disagree
4 with them because of that issue.

5 And one thing that I will read from
6 Staff's response to Bluewater's motion. It is on Page 3
7 under Paragraph 6, which will be the second paragraph. I
8 want to read it into the record because I am not sure
9 these are part of the record yet.

10 Staff wrote, Where Bluewater seems to
11 deviate from Order No. 7066, it's the apparent position
12 that its project should be evaluated differently than
13 other proposed projects because it is a wind project.

14 That is precisely what we raised on
15 August 18th. It is going to have to be evaluated
16 differently. That's also consistent with the open funnel
17 approach.

18 The second thing that I think that
19 supports Commissioner Winslow's proposal about the full
20 funnel approach is the example that is on Page 5 of same
21 response from Staff, Paragraph 9, the example about the
22 excess capacity.

23 We also did raise concerns about whether
24 it's excess capacity, whatever it costs, because of

1 non-bypassable surcharge. But as I said, back in
2 October, that is an issue for the statute. We weren't
3 challenging the Commission on that. Obviously, if we had
4 an issue on that, we need to address that with the
5 legislature.

6 We still have concern that these charges
7 could be passed to the consumers. Increased risk for
8 Delmarva is, in fact, increased risk for the customers
9 based on the statute they are going pay for it. We know
10 that. We certainly have an issue with that,
11 unfortunately. It's not our place to address it. Or
12 this is not the place to address that.

13 But this example, we do not know, yet,
14 what those costs are going to be. At the end of the
15 month, the customer still may pay their \$98 bill despite
16 this excess. We need to see what the numbers are
17 associated with this usage. And that can only be done
18 once they bid and once we see what it cost.

19 And the last thing, to deal with the
20 funnel approach, once again, I rely on legal counsel for
21 this. I'm just an analyst. I don't think you have to
22 accept any of these bids. I think you already determined
23 that. And if, in fact, they are all ugly, we could start
24 over again and get it right. This is the first time.

1 In PJM right now based on 2005 of the
2 resource mix, about 2.3 percent, 2005 was renewables. Of
3 that, less than one percent was wind. All throughout
4 PJM, no one has really done this yet. This is the first
5 time.

6 If you will have some remorse at the
7 end, we look at all of the bids, we can send them back
8 out and start the process again. I don't think there is
9 any statute to prevent us from doing that and let's get
10 it right.

11 CHAIR McRAE: I appreciate your
12 comments, Mr. Citrolo, but let me just say this.

13 If, in fact, there is language that has
14 been referred to, and I apologize for not having your
15 last name again.

16 MR. MANDELSTAM: Madam Chair, it doesn't
17 matter. It's Mandelstam, but Peter is fine.

18 CHAIR McRAE: Peter, you went back to
19 the PPA and you looked at some language in there that
20 spoke to the term of art. And the consultant here said
21 that if you follow those reference documents, you will
22 get to what it means for a wind project.

23 So, my sense is, at a minimum to the
24 extent that the PPA is a part of the notice and

1 understanding and definitional component, go back to the
2 document. If that does not work out, then I do agree
3 that both Commissioner Winslow and Mr. Citrolo have made
4 some points about the funnel.

5 And I heard Mr. Geddes speak about
6 equity arguments. But you know what, I, frankly, feel
7 that if it is not clarified, then I do believe that we --
8 if it's not clarified by going through the documents that
9 are recited in the PPA, then I do believe that we need to
10 allow some latitude.

11 COMMISSIONER CLARK: Madam Chair, to
12 crystallize this.

13 Our options today, and somebody correct
14 me if I'm wrong, one, to deny Bluewater's motion.

15 Second option would be to make an
16 exception and allow them in as a nonconforming bidder.

17 Or thirdly, make a recognition that
18 their alternative definition of maximum contract size is
19 acceptable.

20 Is that the three options that we are
21 faced with, essentially?

22 Does everybody agree with that or not?

23 MR. MANDELSTAM: Just a point of
24 clarification.

1 Isn't it within the Commission's purview
2 to simply accept the bids without prejudice, and as
3 Commissioner Winslow said, simply adopting the big funnel
4 just to let the bids come in and evaluate them?

5 COMMISSIONER CLARK: That would be,
6 then, a decision that would let any bid come in without
7 prejudice.

8 MR. MANDELSTAM: That's correct. And
9 there are those bidders under the notice of intent. And
10 since none of the other bidders, we just learned,
11 submitted for the nonresponsiveness test, then no other
12 bidder has been deemed nonresponsiveness to date. Then,
13 by definition, you will be accepting all of the other
14 bidders because there has been no opportunity for them to
15 be deemed nonresponsiveness.

16 So, in fact, it's quite consistent with
17 the other bidders and no prejudice to them to simply
18 accept the Bluewater bid without prejudice.

19 MR. WILSON: Your Honor, that would go
20 to the core of the integrity of the RFP process.

21 You cannot have bidders who get an
22 advantage late in the process. Everyone has to have the
23 same starting point and got to have notice. Because bids
24 have been constructed based on what has been published,

1 including the 11/28/06 response, which is very clear.

2 Now, people who relied on that, you're
3 going to abandon that, you're going to abandon what they
4 decided to do. They're going to come back, and they're
5 going to challenge this proceeding, and we're going to
6 have to throw out all of the bids and starts all over.

7 COMMISSIONER WINSLOW: A couple of
8 words, and then I'll shut up.

9 First of all, Mr. Wilson and Mr. Geddes
10 make exceptional points. Really good.

11 But we're driven by something else.
12 We're driven by a law. A law was passed. They set
13 almost impossible deadlines for us, and they are
14 expecting us to do something under really some time
15 lines, which aren't really conducive to doing the most
16 excellent work that one would like to see done when you
17 are trying to bid multiple hundred million dollar
18 generating facilities in this state.

19 So, if we make an error along the way
20 out of excess caution and something happens, well, you
21 know, as far as I'm concerned, it happens. And we're
22 doing our best.

23 And my intent, speaking for myself was,
24 this energy resource be permitted to bid, and that we

1 knock them out if we have to, and we may very well have
2 to as part of the evaluation process.

3 So, I am in favor, despite all of the
4 problems you bring up, and I acknowledge all of them. I
5 think they are wonderful points you make. And maybe
6 someone can go to court and get the whole bid process
7 thrown out. There's, obviously, confusion about the
8 notice you referred to because they come here three days
9 before the bid. I don't think they are here frivolously.
10 I think they have an honest disagreement with respect to
11 the language.

12 I can't vote against their position
13 under those circumstances. So, I'm in favor of --

14 MR. WILSON: Your Honor, respectfully,
15 there is a period of time for parties to appeal to raise
16 points and to argue those things out. That time has
17 passed. And it is not something that the Commission can
18 just waive.

19 COMMISSIONER WINSLOW: I adopt
20 Mr. Firestone's argument that it's a point of
21 clarification with respect to the language and not a
22 motion for anything else. And that's why I accept it as
23 a disagreement about the notice and the language and the
24 contract that has come to their attention. And as soon

1 as it came to their attention, they very rapidly brought
2 it to the Commission's attention.

3 CHAIR McRAE: Well, I just have one
4 point that I still think cannot be ignored.

5 If, in fact, the PPA has a definition of
6 a term of art, and it references certain documents, then
7 I believe there is a part of that is information, and if,
8 in fact, it is consistent with what we are being told
9 here by the independent consultant, then I do think that
10 it has to be incorporated in the response, if, in fact,
11 it's in the document. If it's not, I 100 percent agree
12 with what you said.

13 MR. MANDELSTAM: Madam Chair, Bluewater
14 employs, at least, three electrical engineers with more
15 than 75 years of experience. They, obviously, went to
16 the PJM Manual 21, and they, obviously, have given us the
17 view that we have repeated today.

18 So, we, for the record, take exception
19 and disagree with Barry's view on what Manual 21 said.

20 We have come here, as Commissioner
21 Winslow aid, in good faith. We have been here before.
22 Our intent is to respond. To be thoughtful. To be open.
23 To try to provide something that we believe the
24 legislation and the Public Service Commission, and all of

1 the comments have called for, comments from various
2 citizen groups. And we do respectfully ask that the bids
3 be permitted to go forward with no prejudice.

4 And we do have a disagreement on a
5 number of issues, UCAP, PJM Manual 21, et cetera. And I
6 want to pay tribute, as I did to you, Madam Chair, on the
7 record at the last hearing that really, in my nine years
8 in the wind business, I've never seen more thoughtful and
9 hard working consultants. I think it is well within
10 their scope of expertise to be able to handle this and
11 the ambiguities and to evaluate the bids.

12 CHAIR MCRAE: Yes, Mr. Geddes.

13 MR. GEDDES: Madam Chair. We are trying
14 to be proactive and helpful. Although, I am sure
15 sometimes it doesn't seem that way.

16 Perhaps, the Commission would want to
17 consider doing nothing. Allow the bid to come in. And
18 then sort out later what it is and whether it conforms or
19 doesn't conform.

20 But I think it's not fair to the five of
21 you to try to make any decision at the moment.

22 I think following onto Commissioner
23 Winslow's comments, and the other comments of the
24 Commissioners, by allowing it to come in and not just

1 rejecting it out of hand, we, in essence, continue the
2 process and no one is prejudice.

3 Now, how the process is going to work
4 with this bid, we'll have to figure out. But if the
5 Commission made a decision here to deny it, then somebody
6 is prejudice.

7 If the Commission does nothing on this
8 motion, then we go forward, and, perhaps, we can, if we
9 need to, perhaps, it will sort itself out, bring the
10 issue back to you.

11 But, I think, based on this discussion,
12 and as Mr. Sheingold says, direct Delmarva to evaluate
13 the bid.

14 COMMISSIONER CLARK: Otherwise, they
15 would reject it as nonconforming, and it wouldn't get to
16 us.

17 MR. GEDDES: Right. I think they have
18 the sense they shouldn't do that. I think that is the
19 best way to try to resolve what, I think, is a legitimate
20 argument that has been brought up by the petitioner.

21 MR. WILSON: We hate to be in
22 disagreement, but we have to advocate our position. And
23 we would need clear direction from the Commission how to
24 move. Otherwise, we expose the company to challenge us.

1 CHAIR McRAE: What do you mean?

2 MR. WILSON: Whatever direction you give
3 us, we'll follow. No direction exposes us.

4 COMMISSIONER CLARK: The company is on
5 the front line with the --

6 COMMISSIONER WINSLOW: Well, Madam
7 Chair, if I could, I'm going to move that the Commission
8 order that Delmarva accept the bid, whatever it might be,
9 of Bluewater, and that it be considered as nonconforming,
10 if it is, in fact, nonconforming, and the determination
11 of Delmarva Power not automatically be kicked out of the
12 evaluation process, and they be part of the evaluation
13 process of going forward.

14 COMMISSIONER CLARK: As a point of
15 order.

16 You mean, receive the bid, not accept
17 it?

18 COMMISSIONER WINSLOW: Yes. Not accept
19 the bid. Receive it. So, I don't want them to have any
20 liability. I would be willing to accept the liability
21 because I'm immune from liability, I think.

22 CHAIR McRAE: You need the support of
23 the vote. So, we're all on the hook with you.

24 Actually, is there a second?

1 COMMISSIONER LESTER: I would second
2 that.

3 CHAIR McRAE: All in favor.
4 Yea.

5 COMMISSIONER LESTER: Yea.

6 COMMISSIONER WINSLOW: Yea.

7 COMMISSIONER CONAWAY: Yea.

8 COMMISSIONER CLARK: Yea.

9 MR. CHERRY: Yea.

10 CHAIR McRAE: Note Mr. Cherry is on
11 board.

12 Opposed? Very fine.

13 MR. MANDELSTAM: Thank you, Madam Chair
14 and Members of the Commission.

15 MR. BURCAT: Madam Chair and
16 Commissioners.

17 I provided you a memo dated December
18 14th that talks about extending the bid cap on the
19 consultant's budget in this particular matter. I think
20 the reasons and everything are detailed in that memo.

21 It is entirely appropriate, as far as
22 Staff is concerned because, as you can tell, this matter
23 has extended into a lot of different areas, and we're
24 beyond the scope of the original proposal that was

1 accepted.

2 So, I'm asking the Commission to approve
3 what's requested. It's not that they spent the money at
4 this point. It's the fact that we don't want to get to
5 the end and get to that point and then have to come
6 before the Commission at that point. Because it's
7 obvious that we have gone to a point where it has gone
8 well beyond the scope of certain areas.

9 CHAIR McRAE: You said it's not that he
10 spent the money. I noticed the additional charges
11 coupled with what's not billed add up to the amount of
12 the increases. He said something about a contingency
13 fund or something extra. The numbers to the added cost
14 add up to the amount that's being requested here. And
15 then, there's language that says, I don't have it in
16 front of me, but it says there's a lot more work to be
17 done that we haven't billed you for, but we reserve the
18 right to do so. And I have no idea of the quantification
19 of that.

20 MR. BURCAT: Well, you have to realize,
21 this docket is sort of a hybrid for the Commission. Not
22 only is the consultant working for the Commission, but
23 for other state agencies, as well.

24 I certainly can't sit here at this point

1 in time and say -- well, we saw what happened over the
2 past 24 hours. I can't say at this point in time that
3 there wouldn't be other costs. That we will have to come
4 back at a later point in time and request additional
5 amounts. At this point, we're assured that it's gone, at
6 least, to the extent of about \$29,000.

7 CHAIR McRAE: Over. You said it's not
8 all. So, all is some other number that is still in play.

9 MR. BURCAT: Yes.

10 COMMISSIONER WINSLOW: It is perfectly
11 understandable, I think.

12 CHAIR McRAE: I just want to be clear
13 what all is. Is this all, and then there is some more or
14 what?

15 MR. BURCAT: There could be more. I'm
16 absolutely up front. I think the consultant was very up
17 front about that.

18 COMMISSIONER WINSLOW: My only question,
19 frankly, was that I think you've taken a conservative and
20 good position on the request. But my question is whether
21 or not we should just authorize more now. I guess we
22 don't have any real -- we don't have any -- we don't know
23 what it is, so to speak.

24 CHAIR McRAE: Right. This is for

1 already spent money. And clearly, I'll entertain a
2 motion on that one.

3 COMMISSIONER CONAWAY: Move we pay the
4 consultant.

5 COMMISSIONER WINSLOW: Second.

6 MR. BURCAT: We're not paying him.
7 We're extending the cap.

8 COMMISSIONER CONAWAY: Extend the cap.

9 CHAIR McRAE: All in favor.

10 Yea.

11 COMMISSIONER LESTER: Yea.

12 COMMISSIONER WINSLOW: Yea.

13 COMMISSIONER CONAWAY: Yea.

14 COMMISSIONER CLARK: Yea.

15 CHAIR McRAE: Now, does this involve our
16 partner here?

17 MR. BURCAT: He can vote, if he wants.

18 MR. CHERRY: I did not vote on it
19 before.

20 CHAIR McRAE: In that case, you're
21 entitled.

22 MR. CHERRY: I'm okay with paying the
23 consultant. Extending the cap, as it were.

24 CHAIR McRAE: Opposed. Thank you.

1 MR. BURCAT: I think Delmarva is going
2 to want some assurance. It is actually directly from
3 Delmarva. So, I think we need some formality. That's
4 why we're doing it.

5 (The Public Service Commission Hearing
6 was concluded at, approximately, 5:00 p.m.)
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C E R T I F I C A T E

STATE OF DELAWARE:

:

NEW CASTLE COUNTY:

I, Gloria M. D'Amore, a Registered Professional Reporter, within and for the County and State aforesaid, do hereby certify that the foregoing Public Service Commission Hearing, was taken before me, pursuant to notice, at the time and place indicated; that the statements of said parties was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the Public Service Commission Hearing is a true record of the statements given by the parties; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this
23rd day of December A.D. 2006.

GLORIA M. D'AMORE
REGISTERED PROFESSIONAL REPORTER
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